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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. [redacted] 5

HAZEL-ATLAS GLASS COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR HAZEL-ATLAS DEFENDANTS

STEPHEN H. PHILBIN
JOSEPH D. STECHER
Counsel for HAZEL-ATLAS *Defendants.*

October, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 10.

HAZEL-ATLAS GLASS COMPANY, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR HAZEL-ATLAS DEFENDANTS

This is a suit brought by the United States of America for injunctive relief against alleged violations of the Sherman Antitrust Act, Sections 1 and 2 (15 U. S. C., Secs. 1 and 2) and of the Clayton Act, Section 3 (15 U. S. C., Sec. 14).

The suit is before this Court upon direct appeals by defendants, from a final judgment of the district court for the northern district of Ohio, western division, that the Sherman and Clayton laws had been violated and ordering the issue of certain injunctions. Jurisdiction of the appeal is in this Court because of Judicial Code, Sec. 238 as amended, 28 U. S. C., Sec. 345, Act of Feb. 11, 1903, c. 544, Sec. 2, 32 Stat. 823, as amended; 15 U. S. C., Sec. 29, 36 Stat. 1167, Sec. 291. On March 1, 1943 this Court noted probable jurisdiction.

The opinion of the trial court, 46 F. Supp. 541, was filed August 25, 1942; findings of fact and conclusions of law (10 R. 7277) on August 27, 1942; final judg-

ment (10 R. 7653) on October 8, 1942; the petition for appeal by the Hazel-Atlas defendants (10 R. 7778) was allowed December 3, 1942 (10 R. 7806).

The Hazel-Atlas defendants for whom this brief is submitted are the Hazel-Atlas Glass Company, a West Virginia corporation (hereinafter referred to as Hazel or the Hazel Company), J. Harrison McNash, president and director, Walter H. McClure, vice president and director, George S. Quay, secretary and director, and directors L. C. Paull, H. W. Gee, William W. Holloway and B. H. Seabright. Other officers or directors, A. L. Metzner, S. O. Laughlin and J. Summer Jones, were defendants, but were dismissed on motion of the government (1 R. 531; final judgment, 10 R. 7692).

The Hazel defendants' assignment of errors and prayer for reversal (10 R. 7778) are printed in the record, and their appeal complains of the decision of the trial court with respect to them and the injunctions issued against them.

Outline of the Case

This brief will present only the case for the Hazel Company and its associated defendants. We believe that the underlying reason that the trial court decided that the Hazel Company violated the antitrust laws was because the trial court became confused by the great number of issues submitted by the government with respect to the many defendants, and the mass of evidence on many of the issues.

The theory of the government was that the Hartford Company was an illegal monopoly of patents, which made illegal contracts for the purpose and effect of unlawfully restraining trade in three things, namely, glassware patents, glassware machines, and glassware (complaint, para. 34, 1 R. 12). The government was successful in convincing the trial court that Hartford had done these things, and that from 1916 to 1932, when Hazel made its contract with Hartford, the latter had acted illegally, including the making of illegal contracts in 1916 and 1922 with the Corning

and Empire Companies, and in 1924 with the Owens Company. It was then not difficult to persuade the trial court that *because Hazel in 1932 made a contract with Hartford it also must be an illegal contract.*

As we shall show, the Hazel-Hartford contract was reasonable, lawful and did not restrain trade in patents, machines or glassware—the patent licenses exchanged were all non-exclusive, without limitations as to price, quantity or other conditions sometimes held illegal. There is no contention by the government or finding by the trial court that the Hazel Company ever acted improperly with respect to patent matters, including patent office interferences, patent applications, bringing patent suits, buying patents, or in any way other than by entering into the 1932 agreements, including their supplements.

The Hazel Company is a distant second in size to the Owens Company, the largest and about three times larger than Hazel (11 R. 8197 and 7983). The Hazel Company's position is different from that of any other defendant, because it is the only defendant glassware manufacturer which invents, builds and operates its own feeder machines, which it has been doing since 1906 (it has 219 Hazel feeders and one Hartford feeder, Carnahan, 8 R. 5615). All other Hartford licensees, including the Owens Company, use feeders supplied by Hartford together with an elaborate and costly licensee service which costs Hartford hundreds of thousands of dollars a year (12 R. 8595). Hazel has always had the policy of inventing and improving machines for its own use (Carnahan, 8 R. 5596), to be independent of outside concerns and also to make improvements of its own. Other concerns prefer the Hartford feeders and engineering services, and they unquestionably are good, but Hazel considers its own are better.*

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* At this point it may be said that Hartford has claimed for many years that its patents broadly cover feeder operations, such as "gob" feed, "suspended charge" feed, etc., and that Hazel disputes these claims.

Because of the above reasons, the position of the Hazel Company is very different from that of any other defendant in this case, as will later more fully appear.

The Nature of the Case as Stated in the Complaint.

The nature of this case, with its many defendants and different issues, as it was presented to the trial court by the government through a very large number of exhibits and many witnesses, is probably easiest understood by turning to the government's complaint, which the government followed in trying the case in the district court and in arguing its different charges against the different defendants.

(a) *Hartford and Corning, 1916 and 1922.*

The alleged conspiracy is said by the government to have begun between Corning Glass Works and the Hartford Company, under the heading in the complaint, "Formation and continuation of the conspiracy" (paras. 35 to 59; 1 R. 12 et seq.). The Corning Company was a large New York corporation, engaged in manufacturing and selling electric light bulbs, heat-resistant ware and other articles which are not "glass containers". Corning is in a division of the glassware industry other than the glass container division, the "two divisions are independent for commercial purposes" (complaint, para. 29), and Corning has never been a member of the Glass Container Association, the trade association for the glass container industry, to which belong the other defendant glassware manufacturers.

Corning had developed some machines and had some patents, while Hartford was in the machine business and also had patents.

In 1916 a contract (Ex. 1; 12 R. 8598) was made between Hartford and Corning's affiliate, Empire Machine Company, whereby exclusive patent rights in certain patent applications of Hartford and of Empire, then involved in

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* Italics ours throughout unless otherwise stated.

patent interferences, were exchanged. Also Empire received the exclusive right to use a type of Hartford feeder, in certain fields. (An exclusive license for one field prevents the patent owner from thereafter licensing others in that field, *infra*, p. 25.)

By a 1922 contract (Ex. 19; 12 R. 8607) between Hartford, Corning and Empire, the present defendant Hartford-Empire Company was organized, succeeding the old Hartford-Fairmont Company, and the *exclusive* licenses of the 1916 contract were in general followed; Corning stockholders, directly or through Empire, obtained about 40% of the Hartford common stock, and four of the eight or nine directors on the Hartford board; Hartford could not itself manufacture glassware without approval of 65% of its stock or the unanimous vote of its directors; the *exclusive* patent licenses in general gave Corning exclusive rights for its heat-resistant ware and other fields, and Hartford for its glass container machinery field, etc.

The trial court concluded that these agreements were unlawful (conclusions 52, 53; 10 R. 7413).

These are questions for the Hartford and Corning briefs to discuss, as there is no allegation in the complaint nor finding that the Hazel defendants did anything wrongful until 1932.

(b) *Hartford acquisition of Howard, 1922.*

In 1922, the Hartford Company acquired the stock of the Howard Company, which was engaged in the business of licensing feeders and which had feeder patents (complaint, para. 56).

The trial court concluded that such acquisition violated the Sherman Act (conclusion 54; 10 R. 7413). This matter will not be treated in this brief.

(c) *Hartford-Owens, 1924-1932.*

The complaint alleges that by an April 9, 1924 agreement between Hartford and the Owens Company (Ex. 55;

12 R. 8629), the latter joined the conspiracy, and discusses the Hartford and Owens relations from 1924 to 1932 (paras. 53-91).

In 1924 the Owens Company was the largest manufacturer of glass containers, it was using in its manufacture suction machines which it had invented in 1903, and also feeders and forming machines of its own manufacture, and it had numerous patents relating to these machines. Both Hartford and Owens claimed its patents covered the other's machines, and these and other controversies between them were settled by the April 9, 1924, agreement, relating to feeder and forming machine matters. Also, by the agreement

(1) Hartford obtained an *exclusive* license under Owen's patents (Owens could not grant licenses under its own patents).

(2) Hartford could not grant any licenses under Owens' patents without Owens' consent (Sec. 22 of the contract).

(3) Owens received a one-half share in Hartford royalties, after deduction of $600,000 a year, and also the use of some feeders royalty free, up to $440,000 a year.

(4) Owens received a *non-exclusive* license under Hartford patents.

(5) Owens obtained a right to use the valuable Hartford feeders and the Hartford engineering service, upon the payment of royalties, and thereupon commenced relying on Hartford for feeders, no Owens feeder being operated after 1931 (9 R. 6753; Levis, 3 R. 2257).

The trial court concluded that the 1924 agreement violated the Sherman Act (conclusions of law, 55, 56; 10 R. 7413), and also that Hartford and Owens acquisitions of patent rights etc. from a Tucker, Reeves and Beatty concern, and from a Miller concern, violated the Sherman

Act (conclusions 58, 59). These are not matters which will be dealt with in this brief.

(d) *Hartford, Owens and Hazel-Atlas agreements, July 1, 1932.*

The theory of the government with respect to the Hazel Company was that from 1924 to 1932 Hartford and Owens brought patent suits against Hazel to compel it "to become a licensee of Hartford"; that Hartford and Owens succeeded in those suits, obtaining favorable decisions in May, 1932 from the third and sixth circuit courts of appeals*; and that in July, 1932, Hazel joined "the said combination and conspiracy" (complaint, paras. 95, 96, 1 R. 29), by a cross-license agreement between Hartford and Hazel dated July 1, 1932, contained in two parts, a general license agreement and a supplemental license agreement (Exs. 142, 143; 12 R. 8764, 8780). The first part dealt generally with the licenses, rate of royalty, etc., while the second part related chiefly to contingencies—they should, of course, be considered together as being part of one main agreement. The vital points, to which all other provisions were auxiliary and minor, were:

(1) The license did not last after the patents adjudicated against Hazel expired.

(2) The license related only to feeders and forming machines used with feeders (the adjudicated patents covered feeders).

(3) Only *non-exclusive* licenses were granted, by Hartford to Hazel, and by Hazel to Hartford. Each concern was as free to grant licenses under its own patents as it was before the license—neither concern had any control over what licensing the other concern did. In addition, Hartford could grant non-exclusive licenses under Hazel patents, without any control by Hazel.

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* *Hartford* v. *Nivison et al.*, 6 Cir., 58 F. 2d 701; *Hartford* v. *Hazel*, 3 Cir., 59 F. 2d 399.

(4) Hazel was licensed to continue building and operating its own feeders and forming machines, as it had been doing for many years prior. This also was a non-exclusive license, which did not interfere with Hartford granting similar licenses to others.

(5) Hartford licensed Hazel only as to the glassware which Hazel had been making and wanted to make, not heat-resistant ware, etc. There was no agreement as to such articles, so that Hazel could make them but would run the risk of being sued for infringement of Hartford patents.

(6) The licenses did not contain any restriction as to prices or quantities of ware.

(7) Hazel agreed to pay royalties on glassware made by the licensed machines at the same rate, but no higher, as other Hartford licensees (although in exchange for their royalties the other licensees received Hartford feeders, engineering services and protection from patent suits by Hartford and others, while all that Hazel got was freedom from suit by Hartford).

(8) Hartford, in return for the Hazel patent rights, engineering "know-how", and a release of a very important patent claim, agreed to pay Hazel a share of the royalties received by Hartford.

This license agreement made desirable a revision of an old 1909 cross-license agreement between Owens and Hazel (Ex. O-5998, 13 R. 9769), which was done by a new agreement between them, dated July 1, 1932, (Exs. 148, 149; 12 R. 8813, 8821). Briefly, the 1909 agreement had provided that each had *exclusive* patent licenses in their respective businesses, which were narrow-neck ware for Owens and wide-mouth ware for Hazel. In the 1932 agreement, Owens retained its *exclusive* license but Hazel got *only a non-exclusive* license. Also, as Hazel was getting a license from Hartford for Owens' feeder and forming machine patents (Owens having granted Hartford the right to sub-license under Owens' patents), the 1932 license from Owens to Hazel was directly as to Owens' suction inventions, and was

indirectly, through Hartford, as to Owens feeder and forming machine patents, reviving directly in case Hazel lost its Hartford license. There were no restrictions as to price or quantities produced under either license.

The trial court decided that the 1932 Hazel agreements with Hartford and with Owens violated Sections 1 and 2 of the Sherman Act (conclusions of law, 60, 61, 10 R. 7414).

In addition, the trial court ordered Hartford to pay to the clerk of the court the moneys due Hazel for the use by Hartford and its licensees of the Hazel patents, engineering knowledge, etc., and Hazel to pay to the clerk, instead of to Hartford, the royalties due for Hazel's use of the Hartford patents, this being to "insure a sufficient fund for the dissolution of Hartford and the establishment of competing concerns if that ultimately becomes necessary" (impounding order conclusion, 1 R. 518). The clerk now has about four million dollars, Hazel having paid about $1,900,000 and Hartford about $2,100,000, the final judgment continuing the order in force (para. 46, 10 R. 7684). Hazel complains of this action with respect to the monies due Hazel, as well as the decision that the 1932 agreements, with their 1935 supplements, violated the antitrust laws. This brief will discuss these matters.

(e) *Forming machine matters.*

The Hartford Company and the Lynch Company supplied forming machines to glassware manufacturers. The complaint alleges (paras. 111-121) that these two concerns, with the Owens Company, conspired to monopolize the forming machine business, and the trial court decided that they had done so, concluding that Hartford and Owens had acquired in 1933 the O'Neill forming machine assets (conclusion 62, 10 R. 7414); that Lynch had acquired the business of a Miller forming machine concern, with the aid of Hartford and Owens (conclusion 64); and that there was a 1933 "tying" clause agreement between Hartford and Lynch in violation of the Clayton Act, compelling a pur-

chaser of a forming machine to use a Hartford feeder (conclusions 63, 66).

The complaint did not allege, nor did the trial court either find or conclude, that Hazel did anything wrongful with respect to forming machine matters. Only three of the 65 findings on this subject even mention Hazel's name. Finding 308 (10 R. 7344) is that Hazel, a *non-exclusive* licensee under Owens patents, agreed with Owens that if the latter should add to the patents licensed to Hazel by the purchase of some O'Neill patents, Hazel would pay Owens some money for these additional licenses which Hazel would get under its previously existing agreement from Owens, as was only fair. Finding 312 merely refers to the licenses from Owens to Hazel (non-exclusive under the 1932 agreement). Finding 345 (10 R. 7350) merely says that Hazel and others did not restrict their feeder licenses when buying forming machines from Lynch.

Forming machine matters will not be discussed in this brief.

(f) *"Elimination of Competition in Lehrs", 1934.*

The complaint alleges that Hartford and Owens attempted to monopolize the manufacture of lehrs (paras. 122-125), and the trial court so decided (conclusion 67, 10 R. 7416, and findings 351-363, 10 R. 7352 et seq.)

The complaint does not allege nor does the trial court find that Hazel had anything to do with lehr matters, nor were lehrs among the subjects of any Hazel agreement complained of in this suit.

This matter is not for this brief.

(g) *Milk bottle agreements, "Hartford-Owens-Thatcher-Liberty," 1916.*

The complaint alleges (paras. 126-142) that Hartford and Owens induced Thatcher and Liberty, milk bottle manufacturers, to join the conspiracy, and by reason of various agreements and acts from 1916 to 1938, Owens, Thatcher

and Liberty monopolized the milk bottle business and Hartford, through its patents and licensing policies, aided the monopoly.

The trial court sustained this charge, except against Liberty (conclusions 70, 71, 72, 10 R. 7416), Liberty being dismissed from the suit (judgment, 10 R. 7692). There is no charge that Hazel had anything to do with these milk bottle matters, (the 1932 license from Hartford to Hazel did not include milk bottles), so they will not be discussed in this brief.

(h) *Fruit jar matters, "Hartford, Owens, Hazel-Atlas-Ball", 1933.*

The complaint charges, and the trial court decided (conclusions 73-78) that the Sherman Act had been violated in the fruit jar business by several separate transactions. *First* was an acquisition in March, 1933 by Ball Brothers, the leading manufacturer of fruit jars, of the fruit jar businesses of the Knox Company and of the Brockway Company, etc.; *second,* a 1933 license agreement between Hartford and Ball, whereby Ball Brothers obtained certain exclusive patent rights; *third,* alleged but denied oral agreements in 1933 between Ball, Hartford, Hazel and Owens, limiting the production of Hazel and of Owens; and, *fourth,* a 1936 acquisition by Ball Brothers of the assets of the Three Rivers Glass Company.

This brief will deal only with the third matter, and that but shortly (*infra,* p. 57).

(i) *"Hartford, Owens and Anchor Hocking relations," 1931.*

The complaint (paras. 165-169) charged that Hartford and Owens induced the Hocking Company, a licensee of Hartford's, which had previously purchased some interests in other glass concerns, to merge with another concern into defendant Anchor Hocking, which then joined the conspiracy.

After much testimony and exhibits had been offered on this issue, the trial court sustained a motion by Anchor Hocking for dismissal (9 R. 6854), no appeal being taken by the government to the final judgment dismissing it (10 R. 7692).

Hazel was not charged to have been involved in this matter. There would seem to be no reason for further mention of it in this case.

(j) *"The Glass Container Association: production quotas and maintenance of prices."*

The complaint under the above title deals with three different matters (paras. 170-180). *First,* there is the charge that the Glass Container Association, which is the trade association for the glass container industry, and of which defendants Owens, Hazel, Thatcher, Ball, Liberty, and Anchor Hocking (but not Corning) are members, prevented a free competitive market, by sending out production quotas and other information. *Second,* that the Association at the request of Hartford and Owens dissuaded new firms from entering the industry (para. 174). *Third,* that "a *system* of price leadership" exists in the industry, which has been "established and agreed upon and maintained and enforced by concerted action," Corning being the price leader for heat-resistant ware, Owens for narrow-mouth ware, Hazel for wide-mouth ware, Thatcher for milk bottles, and Ball for fruit jars (para. 180).

There was no finding of fact or conclusion of law as to the alleged "system of price leadership." But the trial court did decide that the Association had violated the Sherman Act "through its system of quotas and its activities to keep newcomers from entering the glassware industry" (conclusion 85, 10 R. 7419) upon findings 497 through 508 (10 R. 7376), finding 507 being that Hazel and others acted through the Association to discourage increase of production.

This subject is discussed briefly *infra* (p. 60).

(k) *Remainder of complaint.*

The remainder of the complaint has the titles "Espionage and similar tactics by Hartford, Owens and Corning," "Volume of business and profits," and "Restrictions on machinery and restrictions on use and production of glass containers", and no new subjects are added. The "profits" of Hazel were alleged to have been "excessive" (complaint, paras. 188, 193, 1 R. 54), but no evidence was offered by the government on this point, the government did not ask the trial court so to find in its 681 proposed findings of fact (9 R. 6917, et seq.), and the trial court did not so find (628 findings, 10 R. 7277, et seq.).

Numerous individuals connected with the corporate defendants, including the Hazel Company, as officers or directors are also alleged to have infringed the antitrust laws, because they acted as such when their respective corporations did one or more acts which either are alleged to have constituted a conspiracy or to have been pursuant to a conspiracy, and the trial court decided that nearly all the individual defendants, including several associated with the Hazel Company, violated the antitrust laws and should be enjoined. Such Hazel defendants are also appealing.

Several of the injunctions issued by the trial court, even if the defendants had violated the antitrust laws, far exceeded what was necessary to prevent continued violations, and were punitive and confiscatory, both corporate and individual defendants appealing with respect to these injunctions.

This brief will consider matters relating to the individual defendants and to the injunctions.

I

Questions Presented, Specification of the Assigned Errors, and Summary of Argument.

The questions of whether or not *prior to 1932* there was an illegal monopoly by Hartford of patents or machines, and whether Hartford and others had illegally conspired will be dealt with in briefs for other defendants and not in this brief. However, it may be observed that if the Court should find against the government with respect to these questions, then there was no illegal conspiracy in 1932 for Hazel to join. And even if there were, the 1932 agreement between Hazel and Hartford was not unlawful.

The Hazel assignments of errors (10 R. 7778) may be grouped as follows: Assignments 1 through 4 complain of the holdings in the judgment that the defendants (including the Hazel defendants) violated the Sherman Act, Sections 1 and 2, with respect to trade, patents for glass-making inventions and glass-making machinery, manufacture of glass containers and fruit jars; assignments 5 through 28 complain of various injunctions and orders issued against the Hazel defendants (and others); assignment 29 is to the allowance of costs to plaintiff; assignments 30 through 55 relate to various findings of fact involving Hazel defendants; assignments 56 through 79 relate to conclusions of law involving Hazel defendants; assignments 79 through 83 relate to an order impounding payments under the 1932 Hartford-Hazel agreement; assignment 84 to the court's failure to make findings requested by the Hazel defendants; and assignment 85 incorporates assignments of other defendants.

The questions presented in the case as a whole are many and complicated, but as we see it, on this appeal by Hazel defendants only a few issues are presented, and they, when understood, are not mysterious nor difficult. They are set forth in the following summary of argument, viz:

1. The 1932 agreement between Hazel and Hartford, and the 1935 supplement, did not violate the Sherman anti-trust law.

2. The trial court should not have taken Hazel's money "for the dissolution of Hartford and the establishment of competing concerns."

3. The 1932 agreement between Hazel and Owens, and the 1935 supplement, did not violate the Sherman anti-trust law.

4. There was no oral 1933 agreement, limiting fruit jar production, between Hazel, Owens, Ball Brothers and Hartford. (Hazel's position will be dealt with only briefly here).

5. The Glass Container Association, and Hazel as a member, did not fix quotas of production, or keep newcomers out of the industry. (The Association's brief will discuss this fully, and it will be merely mentioned later).

6. Hazel individual defendants McClure, Quay, Paull, Gee, Holloway and Seabright did not violate the anti-trust laws.

7. The injunctions were unreasonable and confiscatory.

II

ARGUMENT

POINT I

Hazel did not Violate the Sherman Act, by Entering into, and Acting under, the 1932 Cross-License Agreement with Hartford, and the 1935 Supplement.

After two circuit courts of appeals in May, 1932 decided patent suits against Hazel and in favor of Hartford, the Hazel Company entered under date of July 1, 1932 into agreements with the Hartford Company, supplemented in 1935, which agreements the government claimed, and the

trial court concluded, violated Section 1 of the Sherman Act, in that

> "through the use of patents they restrained trade in machines used in the production of glassware, and in the manufacture and distribution of glassware" (conclusion of law 60; 10 R. 7414).

and Section 2 of the Sherman Act, in that these agreements

> "were a combination to monopolize patents covering inventions embodied in machinery used in the production of glassware, to monopolize machines used in the production of glassware, and to monopolize the manufacture and distribution of glassware" (conclusion 61; 10 R. 7414).

The reasons why Hazel entered into the agreements are plain and undisputed.

A. *The situation of Hazel and Hartford prior to July, 1932.*

For many years prior to July, 1932, the Hazel-Atlas Glass Company, a West Virginia corporation, with its main office in Wheeling, West Virginia, and factories in Clarksburg, West Virginia, Washington, Pa., and elsewhere, had been a successful manufacturer of glassware, and had also made machines for its own use. From Hazel's very beginning, it had prided itself upon the ingenuity, resourcefulness and inventive ability of its engineers, who have contributed many useful machines to the glass industry, some patented and many not.

Machines are of vital importance to a glass container manufacturer—he must have the best or at least as good as his competitors. Cheapness of production is essential to the successful glass container manufacturer, and for that he is dependent upon machines. A better machine means much to a manufacturer, and can give him a great competitive advantage over a manufacturer with machines only slightly inferior. For example, a difference in production

of only five bottles a minute per machine would mean to a concern having only ten machines an advantage of 48,000 bottles a day (if a 16 hour day, while Hazel has a 24 hour day, four shifts), or over 150,000,000 bottles a year. So improvements in machines which may appear trifling but which cause even slightly increased production may mean the difference between profit or loss for the manufacturer. Also, the glass container industry as a whole is competing for container business against other industries, and any cheapening of glass articles will benefit the entire glassware industry.

In 1896, the first successful automatic forming machine in the glassware industry was operated in the Atlas plant, predecessor of the Hazel-Atlas Company, its basic principles being used in present day machines of the Hazel Company (Carnahan, 8 R. 5596). This was many years before others had any successful forming machines, including such leaders in the industry as defendant Lynch Company (1917, Werbe, 4 R. 2691), defendant Owens (1917, La France, 8 R. 6287), and Hartford (1916 or later, Smith, 2 R. 1491). In 1920, the Hazel Company developed another type of forming machine, peculiarly adapted to semi wide-mouthed ware, which it has used since that time, now operating thirty-four (Carnahan, 8 R. 5597, 5616), and there have been numerous other kinds of forming machines invented by Hazel engineers prior to 1926, many of which have been patented (Hazel Ex. 5679; 14 R. 10882).

As early as 1906, Hazel had developed and successfully operated feeders (McNash, 3 R. 2329; 4 R. 2503; Carnahan, 8 R. 5607); in 1914 Hazel invented a type of reciprocating plunger feeder (Bowman pat. 1,166,576; Hazel Ex. 5678, 14 R. 10881); and there were other types of feeders operated prior to 1932, of the sliding gate, divided cup, solid cup and

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The small model feeder and forming machine in evidence (Ex. H-A, Exs. 5676 and 5677, 8 R. 5597 and 5604) were invented by Hazel and used by it, and are typical of other Hazel machines.

other types (Carnahan, 8 R. 5607), many of which were patented (Hazel Ex. 5679; 14 R. 10882).

The Hazel employees had been educated in the hard school of practical experience in making glassware. Typical are its president, who commenced as an errand boy and had only three months high school education (McNash, 4 R. 2403, 2526), and its general manager, who commenced as a fifteen year old factory boy, never attending even high school, but whose father, grandfather and great uncle were glassworkers (Carnahan, 8 R. 5594-5596). In 1932 over 400 of the Hazel factory workers had been with the company for over ten years; and the engineering ability of the Hazel organization is evidenced by the many engineers trained in the Hazel factories, who joined other concerns, where they made many improvements (Carnahan, 8 R. 5616, 5621), such as the Proegers, whose inventions are in the Owens suction machine (Ex. O-5997, 13 R. 9755), Ed Miller of the Miller forming machine company, Frank J. O'Neill of the O'Neill forming machine company, Howard of the Howard Company (a feeder inventor), Bridges, chief engineer of the defendant Lynch Company, etc., etc.

With this in mind, the position of the Hazel Company towards Hartford may be understood. Hartford had machines and an engineering organization, which Hazel did not want, preferring to be independent and also believing it knew as much if not more than Hartford did concerning the building and operation of machines for practical use. But Hartford also had patents, which threatened, and, in fact, so the courts eventually decided, dominated the Hazel feeders.

1. *The Hartford patent suits against Hazel.*

In 1926 and 1928 Hartford filed patent suits against Hazel, this being, according to the government, for the purpose of compelling "Hazel-Atlas to become a licensee of Hartford" (complaint, para. 95, 1 R. 29). The first suit was on four patents, against a wholly owned subsidiary of

Hazel, Kearns-Gorsuch Bottle Company, and was decided in May, 1932, by the sixth circuit court of appeals, *Hartford* v. *Nivison, et al.*, 58 F. 2d 701. The other suit was on another patent, against Hazel itself, and was decided by the third circuit court of appeals in the same month, *Hartford* v. *Hazel*, 59 F. 2d 399.

These suits were bitterly fought by Hazel, which spared no expense or trouble to defeat the Hartford patents, even sending a lawyer abroad to search for possible defenses (McNash, 4 R. 2512). But Hazel lost.

The sixth circuit, Nivison, decision.

The sixth circuit suit was upon four Hartford patents, all of primary importance, and it was decided "partially unfavorable to Hartford and partially in favor of Hartford" (finding 173, 10 R. 7314). But Hazel was fearful that a part of that decision which was favorable to it might be reversed by this Court. The eighth circuit court of appeals had made a conflicting decision on two of the same patents, and this Court might conclude the eighth circuit was right, upon certiorari, and sustain those patents. Further, these same two patents, and another Hartford patent, were in a suit in the fourth circuit against the Hazel Company itself (Hazel Ex. 5073, 24 R. 14,758), which again might have resulted in a decision that these two patents controlled plunger feeders, as the eighth circuit court of appeals had held.

The third circuit decision.

In the third circuit case, the circuit court of appeals decided that the Hazel feeders infringed 44 claims of the Hartford patent. As each patent claim is in effect a separate patent, *Leeds & Catlin* v. *Victor Talking*, 213 U. S. 301, 319; *Veneer Machinery* v. *Grand Rapids Chair*, 6 Cir., 227 Fed. 419, 425, this was an overwhelming defeat for Hazel, especially as the court's findings were unequivocably favorable to the Peiler patent, saying that the court gave

"due reward to those who have brought about a rapid and well-nigh miraculous change in the glass-blowing art" (59 F. 2d 400); "Indeed, the radical step Peiler's needle plunger device made in the art over Owens' stream device" (p. 408); "We are therefore warranted in refusing to strike down this patent on the strength of alleged anticipations which absolutely did not disclose Peiler's device or tell the art how to produce the product with which he has swelled to great output in a great industry" (p. 412); and "Peiler made a notable contribution to the art" (p. 413).

This litigation in the third, sixth and fourth circuits perilled the very life of the Hazel Company, because the patents were claimed to cover the Hazel machines which it had been using for the past ten years. And Hartford had threatened further suits, and there had been interferences in the Patent Office between rival Hartford and Hazel inventors (McNash, 4 R. 2510).

2. *What should Hazel have done after the two decisions in May, 1932?*

The Hazel executives who were on the firing line and charged with the duty of operating the factories with the most efficient machines, so as to be able to compete with the many other glassware manufacturers, had heavy responsibilities to their employees and stockholders. They could not afford to take a substantial risk of being deprived of the machines they had used for years and needed for their business. It would have been almost, and perhaps even, criminal for them to take such chances, after the circuit court of appeals' decisions.

It is true, of course, that a decision by a circuit court of appeals is not necessarily the final decision. The law allows a petition for rehearing, which, *if granted, may* result in a reversal. The law also allows a petition to this Court, which, *if granted, may* result in a reversal. But these were only possibilities—not certainties or even probabilities.

Both the appeal court decisions had been very carefully considered, as is apparent from reading them. The sixth circuit case was twice argued before the court, and the decision was unanimous. The third circuit decision was by a majority of the court, with a vigorous dissenting opinion, evidencing the attention given to the case.

As later events showed, a petition in the third circuit case for rehearing would have been hopeless. For when there came before that court another suit on the same patent against the *Shawkee* defendants, who had all the arguments against the patent which Hazel had, and an even stronger case as to non-infringement because they had an "air" feeder instead of the reciprocating plunger type shown in the Peiler patent and used by Hazel, the court decided against them, *Hartford* v. *Shawkee, et al.*, 3 Cir., 68 F. 2d 726 (1934) and denied a petition for rehearing, 73 F. 2d 1013. (Circuit Judges Buffington and Davis did not change their minds about the Hartford patent)*.

As for possible certiorari to this Court in 1932, there was not any conflict with any other court nor any compelling reason why this Court should take the case. Here again subsequent events showed that Hazel would have been wrong in relying upon possible grant of certiorari (without guarantee this Court would reverse if it took the case), because in the later *Shawkee* suit this Court denied three different petitions by the Shawkee defendants, 292 U. S. 640, 293 U. S. 600 and 296 U. S. 635. And it should be observed that this Court later denied defendant's petition in another Hartford patent suit, *Hartford* v. *Swindell*, 306 U. S. 634.

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* Recently the Hazel and Shawkee defendants unsuccessfully petitioned the third circuit court of appeals to vacate the decisions against them, on the ground of fraud practiced on that court, which then decided that it did not have such power, that the fraud was not material, and that there was laches, Circuit Judge Biggs dissenting with opinion, *Hartford* v. *Hazel* v. *Shawkee*, 3 Cir., F. 2d . Hazel and Shawkee are applying to this Court for writs of certiorari.

The point is not whether Hazel could have tried to reverse the third circuit decision, or could have continued fighting the sixth circuit and fourth circuit suits, because of course it could have. The real question is whether the Hazel executives were right in stopping the dangerous litigation and protecting their company, by getting a license from Hartford, which was under no obligation to grant one, and whose licensees, competitors of Hazel, naturally did not want the Hazel competition. The Hazel executives could not be sure that Hartford would be willing later to license the Hazel business, as Hartford might conclude it was more profitable to keep its patents for the use of its licensees, thereby increasing their business by what Hazel lost. What Hazel wanted was to continue doing business without risk from Hartford patents, to pay as little back damages* and future royalties as it could, and if it gave Hartford rights under Hazel patents, to be compensated for them. Surely, these were normal and proper things for Hazel to want.

The trial court found that the 1932 agreements "had the immediate effect of bringing many of Hazel-Atlas' competitors into the fold" (finding 223, 10 R. 7327), and that "As a result of said contracts Hazel-Atlas has been deprived of the means of (1) further combatting and possibly defeating the Hartford and Owens' monopolies in the Courts" (finding 234, 10 R. 7328). The thought seems to have been that a glassware manufacturer such as Hazel was a quasi trustee for the public to contest at its own expense, for the possible benefit of the public, the validity of patents, so that it should not take a license to protect its own business; that the public interests were paramount and it *must* put its own business in jeopardy and fight every claim of infringement to the last possible effort. This is simply saying that no one can take a license until after a final adjudication against him, which, of course, is an untenable theory. And

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* Hazel had to pay a million dollars cash to settle the sixth and third circuit accountings for past infringements and other Hartford patent claims (McNash, 4 R. 2391).

in the present case, Hazel fought the Hartford patents in bitterly contested lawsuits from 1926 to 1932, and even succeeded in obtaining favorable decision as to three patents in the sixth circuit litigation, two of which had been previously sustained by the eighth circuit court of appeals. It is unfair to criticize Hazel for having taken a license under the Hartford patents.

The reason why other concerns took licenses after Hazel did was for the same reason as Hazel, namely, the sixth circuit and third circuit decisions sustaining the Hartford patents. If there had been no court decisions, neither Hazel nor the others would have taken a license, as evidenced by the fact that when the largest company in the industry, Owens, took a license in 1924, this had little if any effect upon others.

Hazel had a right to protect itself, by obtaining a license to use what it needed, and there was nothing illegal in doing so.

B. *The 1932 and 1935 agreements.*

The July 1, 1932 cross-license agreement between Hartford and Hazel was in two parts, a general license agreement (Ex. 142, 12 R. 8764) and a supplemental license agreement (Ex. 143), which contain all the alleged illegal provisions. In 1933 an agreement extended the time for Hartford to litigate a patent, and the 1935 agreement cancelled this for a provision that if others were using the patent royalty free Hazel could also (Ex. 573, 12 R. 9181). The license was only until the last of the patents adjudicated against Hazel expired, i. e., until January 3, 1945.

We think that the error of the trial court was in ignoring the plain fact that the agreement did not limit in any way the right of either party to deal with its own patents, each being precisely as free after the agreement as before, without any control by either over what the other did with its patents; that Hartford and its licensees were licensed to use the Hazel patent rights and engineering

knowledge, thereby increasing competition; and that there was no price or quantity restriction.

The directors and executives of the Hazel Company did not make this agreement blindly and without regard to the antitrust laws. They did the best they could, and did not depend upon only the advice of their own attorneys, but got the best outside advice available, namely, that of their fellow West Virginian, John W. Davis, formerly solicitor general of the United States and counsel for the defendants in *Standard Oil* v. *U. S.*, 283 U. S. 163, where a year earlier this Court had considered patent cross-licensing agreements. The directors approved the agreements only "subject to a favorable opinion by John W. Davis, special counsel, as to their legality" (Ex. 1655, 22 R. 14079), which was given (Ex. H-A 5084, 24 R. 14808). We do not for a moment suggest that the approval of counsel forestalls judicial inquiry, but it would be a sorry day for the bar and public if it does not at least raise a presumption that violation of the law is not intended.

1. *The cross-licensing, with share in royalties, was lawful, especially as the licenses were non-exclusive.*

A patented invention is the exclusive property of the inventor, a license to use the invention is a lawful exercise of his property right, and not only is there nothing wrong in exchanging patent licenses—it is often the only sensible way for patent owners and the public to get any benefit out of adversely held patents. It often occurs that a man with an invention wants the right to use the invention of another, who in turn wants to use the invention of the first. A prior broad invention may be useless without a later improvement invention, or at least not sufficiently better than competing things to warrant developing and commercializing it. In *Clough* v. *Barker* and *Clough* v. *Manufacturing Co.* opinions reported in 106 U. S., pages 166 and 178, the Clough patent for a gas burner was sustained against Barker who was selling the Clough burner with an improvement, and the

Barker patent on the improvement was sustained against Clough, who had to use the improvement to compete with Barker. So neither could sell the best burner until the patent of the other expired. Plainly the sensible thing to have done would have been to cross-license, on some reasonable basis, and, if they licensed others, to share in the royalties according to the values of their respective patents.

a. *All licenses were only non-exclusive, each party remained wholly free to deal with its own patents.*

The patent licenses granted by Hartford to Hazel, and by Hazel to Hartford, were non-exclusive only—they were not exclusive. There is nothing illegal in an exclusive license, but the fact is that there was none in the Hartford-Hazel cross-license.

A non-exclusive license is "a mere waiver of the right to sue by the patentee", *De Forest Co.* v. *U. S.*, 273 U. S. 236, 242. That is all that the non-exclusive licensee has, merely a freedom from suit, and he has no control over the granting of other licenses. An exclusive licensee has not only an immunity from suit, but also a control of the licensing of the patent, because no other license can be granted without his consent. It is in effect a transfer by the patentee to the licensee of the control as to future licensing, which the patentee may lawfully do, *Waterman* v. *Mackenzie*, 138 U. S. 252, 255. Exclusive licenses have long been common, *Independent Wireless* v. *Radio Corp.*, 269 U. S. 459; *Western Electric* v. *Pacent*, 2 Cir., 42 F. 2d 116; and *Cold Metal* v. *United*, 3 Cir., 79 F. 2d 666, being some of the many reported decisions dealing with such licenses.

Hazel granted a *non-exclusive* patent license to Hartford, and the right to sub-license Hazel's competitors, which enabled Hartford and its licensees to use Hazel's inventions and patents, in competition with Hazel. Hazel retained the ownership of its own patents, complete rights to license others, and Hartford did not have any right to sue on a Hazel patent.

The trial court said "Hartford, Corning, Owens, Hazel-Atlas and Lynch combined to pool their patents to control all gob feeding and forming machinery" (finding 486, 10 R. 7374). This is unsupported by any citation to the record, which does not contain anything to this effect. Hazel did not make any agreements with Corning or Lynch. And Hartford and Owens received only non-exclusive licenses, Hazel retaining the title to its patents, the sole right to sue on them, and the right to license anyone on any terms. The right to use the Hazel inventions and patents was not limited or restrained by the 1932 cross-license agreements—on the contrary, it was extended to include Hazel's competitors.

It is true, of course, that a license from Hartford under both Hartford and Hazel patents was worth more than under only Hartford's patents, and, in that way, Hartford's position as a licensor was better. But this did not injure, but on the contrary benefited, other glassware manufacturers, because then there were two concerns instead of one from whom they could obtain a license for Hazel patents. The manufacturer was free to deal directly with Hazel for a license under its patents, and was also free, so far as Hazel was concerned, to deal with Hartford for a license under the patents of Hartford, of Hazel or of both Hartford and Hazel. The record does not show that Hazel has refused to grant licenses under its patents. It is clear that Hazel's *non-exclusive* license to Hartford with right to sub-license was not an illegal pooling by Hazel of its patents.

b. The division of royalties between Hartford and Hazel was lawful.

By the cross-license agreement Hartford obtained from Hazel very valuable considerations, namely, licenses under Hazel's patents, rights to the know-how and engineering experience of Hazel, and the removal of a most serious patent claim. In return for these things, whose value will be later pointed out, Hartford agreed to pay Hazel one-third of what Hartford received in royalties, after Hartford deducted $850,000 for its own purposes.

This was not an unlawful kind of an agreement. It was made the year after this Court had approved a cross-licensing with share in royalties, *Standard Oil* v. *U. S.*, 283 U. S. 163. There, patents in the oil cracking industry were pooled, and there was a partnership between the principal oil companies as to royalties received, which were shared among those contributing licensed patents. This Court said:

> "It (plaintiff) urges, first, that the mere inclusion of the provisions for the division of royalties, constitutes an unlawful combination under the Sherman Act because it evidences an intent to obtain a monopoly. This contention is unsound. Such provisions for the division of royalties are not in themselves conclusive evidence of illegality" (p. 171).

And again:

> "An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation" (p. 171).

In a footnote (p. 171), the Court points out that such cross-licensing is not uncommon.

In the present case, the real complaint of the government against the Hazel Company is that it is being paid out of the royalties for what it contributed. These payments were labelled "rebates", "kickbacks" and similarly semantically disparaged, with the result that the trial court apparently thought that a cross-licensing, with partition of royalties, was illegal where all the licensees did not participate equally in the royalties, although some contributed nothing.* Of course, that is neither reasonable nor law. A few concerns may have large research organizations engaged in expensive developments from which valuable inventions

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* Finding 224 (10 R. 7327) refers to the Hartford-Hazel agreement as a " 'partnership' arrangement", which it was, to the extent of royalties being divided.

come, for which they should be paid when others use them, if only for the reason that they can not afford to maintain them otherwise.

It was impossible in 1932 to agree upon the exact amount in dollars and cents of what the Hazel inventions would be worth to Hartford during the next thirteen years, because no one knew what would be the new inventions nor how much they would be used. A single invention by Hazel which would increase Hazel's production by only 5 bottles a minute would be worth $1,000,000 a year to Hazel (McNash, 4 R. 2517), and *for Hartford's licensees, this would be multiplied many times, because of their total production.*

Again, it was impossible, as a practical matter, to agree in 1932 to examine during the next thirteen years each Hazel patent and ascertain how much it contributed to the total royalties received by Hartford from its licenses under Hartford and Hazel patents. This would mean that each machine and process of the many Hartford licensees would have to be continually checked against the then outstanding patents, which would be practically impossible. First, the machines and the processes would continually change. Second, the patents would continually change, as old patents expired and new ones issued. Third, it was almost inevitable that the patent attorneys for the respective parties would disagree, thereby leading to troublesome and expensive arbitration proceedings, and the last thing that Hazel wanted was any more patent litigation.

The only practical thing was for the parties to make some sort of division of the royalties, and that was what was done.

Hartford got something from Hazel, namely, the right to use in the feeders and forming machines of Hartford and its licensees whatever patented inventions the Hazel Company had in 1932 (there were many), and, even more important, whatever new inventions the Hazel engineers might make or the Hazel Company otherwise obtain during the term of the license; the right to use the secret "know-how" and engineering practices of the Hazel Company;

and a release of a claim which, if good, would have ruined Hartford. Certainly Hartford should pay for what it got. The questions were how much would Hartford receive during the term of the license, and how should it pay.

How much would Hazel lose by giving its competitors rights to use Hazel experience and inventions, and how much was this worth to Hartford? Plainly, Hazel would lose something and Hartford would gain something, but how much no one could tell—technological advances in a fast developing art are often rapid, unexpected and revolutionary. But both Hartford and Hazel did know that Hazel had made inventions and that Hazel was more apt to make important improvements in feeders and forming machines, which it had been developing for many years, than any other concern in the glass industry.

What Hartford agreed to pay to Hazel was one-third of Hartford's income from licenses, after Hartford had first deducted $850,000 a year, which Hartford was wholly free to use for any purpose whatsoever (license agreement, Sec. 7; Ex. 142; 12 R. 8772). This was reached by negotiation, Hartford naturally wanting to pay as little as possible, and Hazel to get as much as it could. And in this connection, Hazel considered that its feeder patents, present and future, were worth much more than those of Owens, which had received under its 1924 agreement with Hartford a part of the latter's income, because Owens had never itself designed a satisfactory feeder, abandoning after 1924 its feeders for the better Hartford feeders and engineering (9 R. 6753; Levis, 3 R. 2257), while Hazel had pioneered in feeders since 1906 and was entirely satisfied to continue using its own feeders, which had contributed much to Hazel's successful manufacture of glassware.

c. *What Hartford got from Hazel was very valuable.*

Hartford got three things from Hazel, of great though indeterminate value. They were a license for Hazel's present and future patents, a right to Hazel's "know-how", and a release of Hazel's claims under the Lott patents.

The evidence in the record is undisputed that these were all very valuable. The Hazel brief in the court below so stated, the opinion of the trial judge is silent on this point, the government did not include a request for a finding as to this among the 681 it did present (9 R. 6917 et seq.), Hazel did request such findings (9 R. 7133), but the trial judge did not make any.

Turning now to what the record shows.

(1) *The Hazel patented inventions.*

The cross license was with respect to only feeder and forming machine inventions. Hazel had pioneered in the designing and developing, and had used, both kinds of machines, many years before Hartford came into existence. Hazel not only had a much longer experience than Hartford —Hazel also had something which Hartford never had, and which is invaluable, namely, years of manufacturing glassware under everyday working conditions, with all the vicissitudes of factory operations, including what unskilled labor can do to high speed, delicately adjusted machinery. And Hazel had made many inventions, some of which it has patented. The list of sixty-six patents and forty-eight applications, owned by Hazel, which list Hartford received during the negotiations leading up to the July, 1932 cross-license, included twenty-two patents and eleven applications relating to feeders, and eight patents and six applications relating to forming machines (Hazel Ex. 5076-b, 13 R. 9897).

In feeders, Hazel had invented in 1906 a very successful type of feeder, which it used for many years, and many other types later and before July, 1932, at which time Hazel had been granted eight patents and had pending in the Patent Office six applications for patents, all with respect to feeders (*supra*, p. 17). The Hartford feeders infringe one of these patents (Brown, 8 R. 6219).

It is true that the Hazel patents are not broad or basic, in the sense that they could prevent others from making

or using feeders. But they do cover Hazel machines, which the Hazel practical operating men have found very useful in their methods of glass container manufacture, that had been very successful, and they did not want their competitors copying them, and thereby appropriating the results of years of work and large expenditures.

As for forming machines, seven Hazel patents have been used in machines made or licensed by the Hartford Company (Brown, 8 R. 6219). These machines were a Hartford model 12, which in 1932 Hartford believed "would be a world beater for manufacturing bottles at a high speed" (Brown, R. 6169), the Hartford model I. S. machine and a Lynch machine. The Hartford licensees in 1939 were using 2 model 12, 102 I. S., and 147 Lynch forming machines (Ex. H-5749, 27 R. 15435). The Hartford engineers in 1932 could not be sure what types of forming machines would be the best, but they did know that they needed the Hazel patents for the most efficient and satisfactory embodiments of their ideas.

The future inventions which Hazel might make during the thirteen years of the license were of great importance to Hartford and its licensees. No one knew, or could know, what the unexcelled experience, ability and enterprise of the Hazel engineers might invent. If they devised an improvement in feeders, which increased production only five per cent, that would give Hazel a tremendous competitive advantage, as would, indeed, anything which would enable Hazel to sell at a fraction of a cent less than its competitors.

So Hartford wanted (Smith, 2 R. 908) and obtained a license under the future feeder and forming machine patents of Hazel. This license was, as aforesaid, merely non-exclusive, and did not give Hartford or its competitors any rights in the Hazel patents—only the right to use them without fear of patent suit.

(2) *The Hazel know-how, or engineering knowledge.*

A non-exclusive patent license, which is merely an agreement not to sue on the patent for infringement is one thing

—knowing how to operate successfully under the patent is something entirely different and without any necessary relation to the license. All the patent licenses in the world would not enable a farmer to manufacture successfully in a competitive industry, such as the glass container, oil cracking, automobile, etc., etc. There is yet no substitute for experience. Patent licenses merely remove patent risks —that is all—, they do not supply technical information or data.

Many highly useful improvements are not patented, but kept secret, so that the outside world does not know of them. If they are patented, they become known to competitors, who can use them secretly. Even when such use is discovered and a patent infringement suit brought, the patent may be invalidated, in which case the owner of the improvement has lost the exclusive use of what he has done.

In the present case, the Hazel engineers had been working on various machines since 1896, having then invented and used the first successful forming machine, and they also had invented and used many different kinds of feeders since 1906. They had a wide practical experience in commercial operation with over fifty different types of feeders and forming machines (Carnahan, 8 R. 5622). As might be expected, the Hazel engineers have made many unpatented improvements in feeders and forming machines (Exs. 5678, 5679, 14 R. 10881, 10882). One of those many valuable improvements alone is worth $250,000 a year to Hazel (Carnahan, 8 R. 5615).*

Hazel knew a great deal about manufacturing glass containers and what machines should be used, because it had been doing this for thirty-five years. *Hartford had never engaged in the practical manufacture of glassware.*

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* Such unpatented "know-how" would be worth much more to Hartford, because of its many licensees who could use it.

Hazel knew what could be done and what could not, it had made, and remedied, the countless mistakes which all practical workers must make, and it knew the little things which made machines run longer and better, and produce ware free of defects. Hartford did not.

The cross-license agreement obligates Hazel

> "to furnish Hartford the advantage and benefit, with respect to Licensed Inventions, of *the knowledge and experience of Hazel-Atlas' engineers and technically trained employees, obtained in practical commercial use* of glass working mechanisms and methods at the cost to Hazel-Atlas of furnishing such advantage and benefit, and provided that such furnishing does not interfere substantially with Hazel-Atlas' production" (General License Agreement, Sec. 6, 12 R. 8771).

This was much objected to by the Hazel factory organization, because "they did not want to give Hartford any information which might be what we considered our own ideas. They had been worked on for years and developed various things, and we did not just feel that we should pass it out to someone else. Maybe that was selfish reason, but nevertheless that was true" (Carnahan, 8 R. 5624). But whether or not it be "selfish" to want to keep for one's company the invention which he has made at the company's expense, it certainly is still a natural sentiment in this country, and there can be no question that giving competitors valuable information is detrimental to the giver and beneficial to his competitor. After the July, 1932, agreement, there were several visits by the Hartford engineers to the Hazel factories, running over quite a period of time (Carnahan, 8 R. 5626).

It is true that the value of knowledge of another's manufacturing process and machines is impossible to establish in dollars and cents, because not only may the things learned be useful, but they may suggest still other and better ways. Doubtless these advantages are indefinite, but, it is plain, none the less real, substantial and valuable.

(3) *Hazel released its claims to the Lott patents, admitted by Hartford to be infringed by its feeders.*

The Lott patents 1,382,993 and 1,382,994 were broad patents covering the Hartford feeders, as Hartford had admitted in 1924 by consenting to a decree against it in a patent infringement suit, agreeing that the patents were valid and infringed by the Hartford feeders, *Owens* v. *Hamilton & Hartford* (Hazel Ex. 5081, 24 R. 14805). The patents were granted on June 28, 1921, and, of course, did not expire until seventeen years later, on June 28, 1938.

The patents were owned by the Owens Company, which brought the above referred to suit, but the Hazel Company had certain exclusive rights to them under its 1909 agreement with the Owens Company (Ex. O-5998, 13 R. 9769), whereby Hazel obtained an *exclusive* license in the wide-mouth field,* in which Hazel was doing business.

But in 1924 Owens ignored the Hazel rights by making its April 9, 1924 agreement with Hartford, which purported to give Hartford an exclusive license under the Lott (and other) patents. This Owens had no right to do, because it had already sold to Hazel an exclusive license for wide-mouth ware.

In September, 1924, the Hazel Company served formal notice upon the Owens Company of the latter's breach of the 1909 contract, saying that its 1924 agreement with Hartford "is the most important case of a transfer or attempted transfer by you to others of rights and licenses which we were *exclusively* entitled to possess" (Ex. 910, 21 R. 13567), the Owens Company subsequently denying the claimed violation (letter, Ex. 911), and taking the position that the 1909 agreement covered only suction inventions and not feeders and forming machine inventions (Williams, 5 R. 3769; McNerney, 9 R. 6377). The dispute was not

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* Wide-mouth ware is about one-third of all glass containers (finding of fact 314, 10 R. 7345).

settled and in 1925 Hazel commenced to prepare for legal action against Owens to establish Hazel's rights, a proposed bill of complaint and interrogatories being sent in February, 1926, to the Hazel Company by its attorneys (Hazel Exs. 5074, 24 R. 14758 et seq.). But by that time Hartford and Owens had seized the offensive and compelled Hazel to devote its energies to defending itself. In January, 1926, and again in the next month Hazel received from Hartford the usual notices preliminary to patent infringement suits (Hazel Ex. 5073, 24 R. 14758), followed by the filing of several patent suits by Hartford in April and May, including one against Hazel's subsidiary, Kearns-Gorsuch. As these suits on feeder patents threatened the very life of the Hazel Company, the proposed offensive suit against Owens had to wait (McNash, 4 R. 2513 et seq.), which could be done without Hazel being injured, as the Lott patents did not expire until 1938.

The record is very plain as to the importance of the Hazel claim to rights to Owens non-suction patents, and its continued insistence upon them, including a 1919 Hazel letter to Owens, claiming exclusive licenses for a non-suction feeder forming machine (in Owens Ex. 5208, not printed, Stip. 28 R. 16531); 1924 letter by Hartford's president to a Hartford licensee that Hazel considered "they were entitled to rights under the Lott patents anyway" (Hartford Ex. 6112, 28 R. 16255); 1926 draft of complaint and interrogatories in proposed suit by Hazel against Owens to enforce the 1909 agreement (Hazel Ex. 5074, 24 R. 14758); 1927 letter by Owens counsel to Owens that the Hazel claim was "a very important question, and to decide the situation wrongfully either way would be quite a serious matter", and "I am unable to state definitely whether or not Hazel has the exclusive right" (Owens Ex. 6000, 28 R. 16068); and 1930 memorandum by Owens counsel that opinions previously expressed by Owens attorneys on this subject, including the 1927 letter, are not "definitely final of their views" (Owens' Ex. O-5999, 28 R. 16064).

The testimony at the trial was positive, and uncontradicted, that the Hazel claim was considered very serious, and also that it was an important factor in the negotiations between Hartford and Hazel (Smith, 2 R. 908; Levis, 3 R. 1975, 1976; McNash, 4 R. 2376; Williams, 5 R. 3752, 3769; McNerney, 9 R. 6387; and Belknap, 9 R. 6479). If Hazel was right, Hartford had to pay damages for many years of past infringement by its feeders, and more vital, its feeders could not be used in the very important wide-mouth field until the Lott patents expired in June, 1938. Obviously, the release which Hartford got, and the license for the future, were worth a great deal to Hartford.

d. *The fact that Hazel receipts became larger than Hartford's did not make the agreement illegal.*

During the negotiations various methods were considered for fixing a value on what the respective patent rights of Hartford and Hazel would be worth during the next thirteen years. The Hazel company was in a different position from other licensees, because it built and operated its own feeders, using its own patented inventions, and obviously should pay less for Hartford patents than a concern which obtained feeders from Hartford and depended upon it for maintaining and servicing them. Hartford has always taken care of its feeder licensees (excepting Hazel), and at the time of the trial Hartford was spending about $1,000,000 a year for licensee service, research, etc. (12 R. 8595). On the other hand, Hazel always has had its own engineering organization, which at the time of trial cost it about $250,000 a year, and Hazel also had 200 engineers of which 70 did only research and development work (Carnahan, 8 R. 5618). Also, Hartford protected licensees using its feeders against patent infringement suits by others, paying all the expenses of defense and reimbursing the licensee for royalties paid so that he would not have to pay Hartford in addition to the patent owner (Hartford licenses,

Ex. 152, Sec. 18, 12 R. 8846; Ex. 199, Sec. 14, 12 R. 8888, etc., etc.).

So Hazel had things that other licensees did not have, which Hartford wanted, and Hazel did not want some of the things which Hartford had, i. e., feeders and service, and patent protection.

The agreement finally was that Hazel agreed to pay royalties to Hartford at the same rates which Hartford charged other licensees, and Hartford agreed to pay Hazel one-third of the royalties received by it, after deducting $850,000 for its own use (license, Sec. 6). This meant, so the parties believed at the time, that Hazel would be paying about $100,000 or $200,000 more than it received (McNash, 4 R. 2394; Smith, 2 R. 908). Of course, this assumption was upon the basis of Hazel continuing to do about the same percentage of business as the other licensees, because if Hazel did more in proportion, it would pay more to Hartford and not receive back such additional amount, and vice versa.

The relative payments ran as expected until 1934, after the repeal of prohibition, when the businesses of other licensees, but not that of the Hazel company, were greatly increased by the manufacture of beer, whiskey and other liquor bottles (McNash, 4 R. 2394). So the percentage commenced to run in favor of Hazel, being for the year 1934 slightly in its favor, $827,000 from Hazel to Hartford, and $877,000 from Hartford to Hazel. Since that time the percentage has increased until in 1939 Hazel paid Hartford $1,153,000 and Hartford paid Hazel $1,509,000, a difference of about $450,000 in favor of Hazel. But obviously the difference might have gone the other way, and Hazel have paid much more than it received.

We do not think that the test of legality is whether what happened after the agreement was made caused Hartford or Hazel to pay the most, but whether the payments, by Hartford to Hazel in exchange for rights to use the Hazel things, restrained trade or otherwise violated the antitrust laws.

There is no finding of fact that Hartford paying Hazel for the latters' inventions, etc., restrained trade. And, as might be assumed from this, the evidence does not establish such restraint.

e. *There is no evidence that the cross-license agreement restrained trade in patents, machines or glassware.*

The accused cross-license agreement was made in July, 1932 and is still in effect. There was no evidence that it has restrained trade or tended to create any kind of a monopoly in the glassware industry, (much less that the payments to Hazel, which aided it in maintaining an independent organization for inventions and improvements, inuring to the benefit of the Hartford licensees and the public generally, restrained trade).

Patents were not monopolized. On the contrary, both Hartford and Hazel had precisely the same rights after the agreement as before to deal with their own patents, and in addition Hartford could license under Hazel's patents without the latter's consent.

Machines were not monopolized. Hartford was not restrained by Hazel from doing anything with respect to machines. Hazel received a non-exclusive license from Hartford to build and use its own feeders and forming machines, as Hazel had been doing for many years. Hartford did not grant Hazel a license to sell such machines, but Hazel never had sold them, and also Hazel could not compel Hartford to grant Hazel such a license (which Hazel did not want).

Glassware was not monopolized by Hazel. It was the second largest concern in the glass industry for many years before 1932 and has so continued. Since 1932 there has been no decrease in the number of its competitors (there are twenty-seven in the east and five on the Pacific coast, McNash, 4 R. 2555); the businesses of its competitors have increased; and the percentage increases of Hazel's small and medium sized competitors have been much greater than Hazel's (Glass Container Exs. 6082-6092, 28 R. 1642 et seq.). The yearly profits of Hazel have been less after 1932 than be-

fore (Ex. 946, 10 R. 7966, 11 R. 7969), it being observed that the government abandoned at the trial the contention in the complaint that Hazel made "excessive profits" (complaint, paras. 188, 193, 1 R. 54), not asking the trial court for any such finding and the trial court not making any.

Findings 224 and 225 (10 R. 7327) are "One of the motives of the parties in entering into the 1932 'partnership arrangement' was to place and maintain Hazel-Atlas and Owens in a dominant position in the industry" (finding 224), and "As a result of said contracts, Hazel-Atlas has been confirmed in a dominant position over its competitors" (finding 225). Neither finding cites any evidence in the record to support it. There was none. The Hazel Company was the second largest in the industry many years prior to 1932, its proportionate share of the business *decreased* after 1932, and the evidence does not establish that, if Hazel had never made its 1932 agreement with Hartford, its business would not have been what it was, provided it could use its own feeders free from Hartford patents.

The trial court found that the Hartford royalties "have been a burden on the glassware industry" (finding 478, 10 R. 7373), and that "Since 1932 Hartford has made excessive profits from royalties, * * * in excess of those required to pay all its expenses and to provide it with a reasonable return upon its capital investment" (finding 481, 10 R. 7374). The Hartford brief, we understand, will argue the point that the royalties were not high and did not burden the industry (which seems clearly established by the histories of profitable operation by the many Hartford licensees, particularly the small companies). But the point here with respect to Hazel is that there is no evidence, *and there is no finding by the trial court,* that the Hartford payments to Hazel caused the royalties to be burdensome.

Naturally Hartford and the licensees who use its feeders and engineering services, in competition with Hazel, would prefer to pay nothing for the Hazel inventions and know-how, which are produced by the costly research and development engineering organization that Hazel has been main-

taining for many years, in order to develop and improve glass machines, for the benefit of the public as well as Hazel. But there is no reason why they should not pay for what they get, and for which Hazel has to pay to obtain.

There is absolutely nothing in the record to show that Hazel receipts of payments for the licenses it granted restrained trade in patents, machines or glassware.

2. *Receipt by Hazel of a non-exclusive limited license, including a license to make machines, with a patent validity clause and a "most favored nations" clause, did not violate the antitrust laws.*

The government complained, and the trial court found, that Hazel had violated the antitrust laws by entering into some natural, ordinary, and entirely lawful provisions in patent licenses, the government contending below (brief, pp. 198-211) that the license received by Hazel was illegal, because it was too narrow, in that it did not include heat-resistant ware, etc., and because it was too broad, in that it included building machines for Hazel's own use.

a. *The receipt by Hazel of a limited (restrictive) patent license was lawful.*

The trial court seems to have overlooked the fact that Hartford owned its patents, that it did not have to grant a license unless it wanted to, and that Hartford could prescribe conditions in its licenses. What Hazel wanted from Hartford was a license, i. e., immunity from suit, for what it had been doing and intended to do, namely, to manufacture and sell its lines of glassware, and to build machines for its use. That is what it got. It is true that Hartford did not grant Hazel a license for milk bottles, heat-resistant ware, and other things, but Hazel was not in those businesses.

Even if Hartford had been willing to grant Hazel a broader license, why should Hazel have bought something it did not need or want?

Limited licenses have always been lawful. A patentee does not have to license anyone, and if he does license, he can do so conditionally, within limits, as well as unconditionally, *Ethyl Gasolene* v. *U. S.*, 309 U. S. 436, 456. He does not violate the antitrust laws if he keeps his property to himself, nor if he licenses one or more to use it to such extent as he wills.

It is important here to observe that when a patent owner grants a license limited to a certain field, e. g. fruit jars, each party remains in exactly the same position with respect to the unlicensed fields as if no license for fruit jars had been granted. A limited license is simply an agreement by the patent owner that he will not sue the licensee when the latter is operating in the licensed field, e. g., fruit jars. If the licensee does make milk bottles, he is in exactly the same position as if he had never taken a fruit jar license—he can be sued for patent infringement on his milk bottle manufacture, and, if sued, he is entirely free to defend on the ground that the patent is invalid or not infringed. And there have been many cases where a limited licensee has operated outside his restricted license, being then sued for patent infringement and defending on the grounds that the patent was invalid and not infringed, *Indiana Mfg. Co.* v. *Nichols*, 190 F. (C. C., Ind.) 579, 584; *T. H. Symington Co.* v. *National Malleable*, 257 F. (D. C., Ill.) 564, 565; *Int. Burr* v. *Wood Grinding*, 2 Cir., 34 F. 2d 905, 909; *Chance* v. *Lehigh Navigation*, 25 F. Supp. 532 (D. C., Pa.), etc.

The point here is that Hazel did not violate the anti-trust laws, by obtaining an immunity from suit for patent infringement when manufacturing the licensed glassware, without any agreement by Hazel that it would not manufacture unlicensed glassware, and thereby running precisely the same patent risks, neither more nor less, as it would have run if it had not taken a Hartford license.

b. *The receipt by Hazel of a non-exclusive license to build machines for its own use, an "inventions" license, was lawful.*

Hazel wanted, and got a non-exclusive license from Hartford to manufacture feeder and forming machines for its own use, which the government calls an "inventions" license, and which enabled Hazel to continue making and using its own inventions, as it had been doing since before Hartford existed. *Hartford remained wholly free to grant such licenses to others.*

The government attacked this non-exclusive license to Hazel on several grounds, and succeeded in persuading the trial judge that it was illegal.

First, it was said that Hartford had not granted many such licenses to others, either before or after the Hazel license. But Hazel had nothing to do with this—so far as Hazel was concerned Hartford was perfectly free to license others similarly.

Second, the government persuaded the trial judge that when Hazel was enabled to continue inventing and using its own feeders, by freeing itself from the adverse court decisions through a Hartford license, this restrained competition. The trial judge found:

> "199. For several years prior to July 1, 1932, Hazel-Atlas *used* glass feeders and forming machines of its own design and manufacture *in competition* with feeders and forming machines designed by Hartford" (10 R. 7321).

The above sounds as if Hazel was in the machine supply business in competition with Hartford, which is not true. All that it really means is that Hazel used its own feeders. There is no dispute that Hazel never sold, leased or otherwise disposed of a feeder or a forming machine to anyone, designing and building these machines for its own use only (McNash, 4 R. 2351, 2516; Carnahan, 8 R. 5615).

The trial judge also found:

> "234. As a result of said contracts Hazel-Atlas has been deprived of the means of * * * (2) using and developing competing devices which might defeat the Hartford and Owens monopolies through economic competition" (10 R. 7328).

Nothing in the record is cited in support of this proposition—there is nothing. The record is precisely to the contrary. The contracts freed Hazel from the Hartford patents, including those adjudicated against Hazel, with respect to feeders and forming machines, the only machines dealt with in the licenses. Hazel was enabled, by the contracts, to continue inventing and using its own machines, as it has been doing at an expense to it of hundreds of thousands of dollars a year (Carnahan, 8 R. 5618).

Furthermore, not only was Hazel not "deprived of the means of" developing new machines, but the payments to it by Hartford for the use of the Hazel inventions increased Hazel's ability to spend money on research and development of new machines for the glass container industry. And it should be observed that when the trial judge based a finding on this point on citations to the record, he did not mention Hazel, as follows (10 R. 7375):

> "493. Invention in glass making machinery has been discouraged and suppressed by the removal of competition in the development of glass making machinery. Corning and Owens ceased all development work on feeders as a result of their 1922 and 1924 agreements, respectively, with Hartford (R. 7935; Ex. 629). The acquisition by Hartford of Howard, Miller, Tucker, Reeves & Beatty, and Kucera, ended development work by the original producers of these machines. The acquisition by Owens of the O'Neill machine ended all development work on that machine."

Hazel certainly was not discouraged or suppressed by taking a license from Hartford, because thereby Hazel was

enabled to continue its many years' old policy of designing and developing new machines as it has done to date. The trial court plainly was mistaken in thinking that Hazel violated the anti-trust laws, because it took a *non-exclusive* license to manufacture feeders and forming machines for its own use.

Third, Hartford gave Hazel a license to make and use, but not to sell, feeders and formers. The government seems to think that it was unlawful for Hazel to receive such a limited license. But that was all Hartford would give, and, as a practical matter, it was all that Hazel wanted. Hazel had never been in the business of selling feeders or formers, which is very different from the glass container business.

Incidentally, the judgment in the present case orders Hazel to go into the patent licensing business, with all its attendant legal complications and expenses in the forms of contracts, patent infringement and antitrust suits, releases, etc., etc., and to grant licenses to make and use, but not to sell (judgment, para. 24(b), 10 R. 7668).

c. *The very limited acknowledgment of the validity and scope of patents was proper.*

The trial court concluded that the license acknowledgments of patent validity and scope restrained trade in licensing patents and machines (conclusion 81; 10 R. 7418). But it has long been the law that, in the absence of any agreement on the point, "a licensee can not question the validity of the patent", *Miami Cycle* v. *Robinson,* 6 Cir., 245 F. 556, 565; *Freeman* v. *Altvater,* 8 Cir., 66 F. 2d 506, 507. The principle is like "the rule of landlord and tenant, which is the basis of estoppel by a patent licensee", *Indiana Mfg. Co.* v. *Nichols,* 190 F. (C. C. Ind.) 579, 584. And, as the law writes into every license, in the absence of contrary stipulation, an admission with respect to the licensed patents and acts, the expression of what the law implies is not unlawful. Of course, the reason for the express statement is the common one that the parties, although not familiar with law, may fully understand the effect of their contract.

Sola Electric v. *Jefferson Electric*, 317 U. S. 173, did not decide otherwise. In that case, there was a patent license contract containing a price maintenance clause which was illegal, unless the patent was valid. The licensee defended a suit for royalties on the ground that the contract was unenforceable, because the patent was invalid. This Court held that the licensee was not estopped to deny the validity of the patent, as a different rule would permit manufacturers, under the guise of patents which in fact were worthless, to make illegal price fixing agreements. The *Sola* decision is not pertinent here, because Hazel did not agree in its license to maintain prices, to limit production or to do something else which would have been illegal without a valid patent.

The acknowledgment was carefully limited to what was covered by the license, and it left both parties entirely free to question validity and scope when operating outside the license. It was:

> "Section 8. Validity and Scope. During the life of this Agreement and while a party is enjoying the benefits of the Licensed Inventions, it acknowleges, within the scope of its license, the validity and broad scope of all United States patents issued or to be issued on Licensed Inventions" (12 R. 8773).

This acknowledgment was not broad and unqualified, but, on the contrary, it has three important limitations.

First, it is limited to "During the life of this Agreement". This avoided any possible contention that the estoppel would last longer than the license which created the estoppel.

Second, it is limited to "while a party is enjoying the benefits of the Licensed Inventions", that is, only if the "Licensed Inventions", which the agreement defines as certain patents, were actually benefiting the licensee by their patent protection.

Third, it is further limited to operations "within the scope of its license". So even if a party was getting a benefit from a licensed patent, there would be no acknowledgment unless operating in a field licensed under the patent.

The limited acknowledgment included "broad scope" as well as "validity". The Hartford third circuit patent had been broadly sustained as to 44 different claims against Hazel, and the other Hartford patents would have as to each claim the scope to which it would be entitled. Of course, each patent claim must be different from any other claim, and some necessarily are narrower than others, and "broad scope" means any scope which in fact and law the claim is entitled to have. And the acknowledgment as to this was limited in the same three ways as the "validity" acknowledgment.

Outside of the license, both parties were as free to dispute validity and scope as they were before making the agreement. The only acts as to which there was an estoppel were some, but not all, of those within the license.

d. *The "most favored nations" provision was lawful.*

Hazel did not want to pay at higher rates of royalty than other licensees (it had to pay more, for the same rate, *supra,* p. 36), and Hartford agreed, by a so-called "most favored nations" clause (agreement, 12 R. 8769) that Hazel need not. It is impossible for us to see how Hazel restrained trade or otherwise violated the antitrust laws by thus protecting itself against Hartford licensing others on better terms, such as the Owens Company, much larger than Hazel.

It appears that Hartford did not put a similar provision in all its other licensees, but Hazel had nothing to do with that, nor is it so claimed.

3. *Hazel had nothing to say about Hartford's licensing policy.*

There is no dispute that the 1932 agreements of Hazel with Hartford and with Owens did not give Hazel any rights in either the Hartford or Owens patents except not to be sued on them—simple, non-exclusive licenses. Not-

withstanding this the trial court assumed, without any support in the record, that Hazel had a joint control with them, particularly Hartford, as to the licenses they granted or refused. In the present case, there is not even a question of findings made on conflicting or disputed evidence—there is no conflict or dispute, the facts are not in question. There is *no support* for the findings.

(a) *Finding 223* (10 R. 7326) says that "the agreements of July 1, 1932 gave Hazel-Atlas a share in the counsels of Hartford, Corning and Owens in their campaign to dominate the industry". Nothing is cited in support of this, and there is nothing. Certainly there is nothing in any of the Hazel agreements to such effect, Hazel receiving only non-exclusive licenses.

(b) *Finding 242* (10 R. 7330) says "McNash of Hazel-Atlas communicated on a number of occasions with F. G. Smith of Hartford with respect to *the plans of Hartford, Owens and Hazel-Atlas to eliminate competition* from feeders not under license from Hartford". Six letters are cited in support of this. Only three were communications from McNash, they were written in 1932 a few months after Hazel became a licensee, and none had anything to do with eliminating competition. Exhibit 222 (19 R. 12746) was a September 1932 letter from McNash of Hazel to Smith of Hartford asking for information about what kind of a license Hartford had granted the McKee Company, and (Hazel having a limited license from Hartford) saying "If they have not a license to make this character of ware they certainly should not be permitted to do so"; Exhibit 925 (21 R. 13577) was an October 1932 letter from McNash to Smith about a new feeder machine, in which Hazel as a manufacturer, user and licensor of feeders, was naturally interested, saying that the real backers of the new feeder probably were the Amsler-Morton Company; and Exhibit 922 (21 R. 13575) was a September 1932 letter from McNash to Smith, that another feeder had been offered to Hazel, and asking whether Hartford was interested.

The other three exhibits were Exhibit 783 (21 R. 13459), an August 1932 letter by Levis of Owens to his uncle, which does not mention any communication on any subject from Hazel to either Hartford or Owens; and Exhibits 223 (19 R. 12746) and 927 (21 R. 13578), which were merely replies by Smith to Exhibits 922 and 925.

The McNash letters were very far from supporting a finding that McNash wrote Hartford about "plans of Hartford, Owens and Hazel-Atlas to eliminate competition".

(c) *Finding 244* (10 R. 7330) is that "Hazel-Atlas actively cooperated with Hartford in an attempt to restrict the field of ware of manufacturers who became licensees after July 1, 1932", citing testimony and five exhibits. But the cited testimony was about a dispute in 1931, not "after July, 1932", between Hazel and Owens concerning sales activities, which had nothing to do with Hartford (McNash, 4 R. 2360, 2361, folios 4395-4399), and Exhibit 776 (21 R. 13454) was a December 1931 letter between Hazel and Owens about the same matter. There is only one communication between Hartford and Hazel, namely, a November 1932 letter from McNash of Hazel to Smith of Hartford, Exhibit 155 (19 R. 12675), in which McNash said "we would have no objection to Latchford's having a fruit jar license, restricted", McNash here merely agreeing with something that Smith, not McNash had proposed (McNash, 4 R. 2404); and there was no suggestion that Hazel had anything to do with Hartford's decision as to what kind of a license Hartford granted Latchford.

Exhibits 954 and 956 (21 R. 13601, 13603) are September 1933 letters from a Hazel employee in charge of sales as a vice president of a Pacific Coast subsidiary of Hazel (McNash, 4 R. 2405), Miedel, to McNash, the Hazel president, complaining of competitors' actions (this was in the depression, NRA days), as salesmen always do. Miedel said that he did not want Hartford to extend its license to Maywood (Ex. 954), and that "If Hartford wants our views, we should certainly give them to them, and *then it is up to Hartford*

to notify their clients one way or the other" (Ex. 956). McNash paid no attention to these letters, and never took up the matter with Hartford. Exhibit 823 (21 R. 13487) was an October 1933 letter from McNash to Miedel that "I never have been much of a believer in anyone's ability to put some one else out of the glass business", and there is not a word about McNash or Hazel discussing or doing anything with Hartford about licenses or anything else.

(d) *Finding 258* (10 R. 7333) is that "Hazel-Atlas cooperated with Hartford and Owens in getting Maywood and Latchford to take Hartford licenses (R. 4599, 4601; Ex. 155)". Pease of Hartford testified at the cited pages (5 R. 3234-3236) that in December, 1932, he talked to Owens, Long Beach Glass and Hazel regarding Hartford granting licenses to the Maywood, Latchford and Northwestern companies. This was natural and proper, because those concerns had licenses from Hartford and knew the business situation, which Hartford naturally wanted to know before it decided whether it would make more money by granting additional licenses. If Hartford could make more money by doing so, it would—that was Hartford's business. The then Hartford licensees were not in favor of Hartford giving a license to Maywood, had no particular objection to Latchford and were not enthusiastic about Northwestern. Pease told them "That we intended to license them; which we did" (5 R. 3235). That was not "cooperation". Exhibit 155 has been considered in connection with finding 244, *supra,* (c).

(e) *Finding 370* (10 R. 7355) says that "In the summer of 1932, F. G. Smith, McNash and Levis were all attempting to persuade Ball Brothers to accept a license". There is no citation to the record, which does not support it.

(f) *Finding 371* (10 R. 7355) declares that "McNash of Hazel-Atlas did everything he could to help Ball Brothers decide to take a license (Ex. 176)". That is not so. In the fall of 1932 Ball Brothers, the leaders in the fruit jar field, were considering taking a license from Hartford, but they

wanted an *exclusive* license for fruit jars, or at least as exclusive as they could get. Hazel then had a non-exclusive fruit jar license from Hartford, and Ball wanted this license limited to a fixed number of fruit jars a year. McNash was willing to do what he could to satisfy Ball, *provided it did not restrict Hazel* (McNash, 4 R. 2422). The Exhibit 176 (19 R. 12702) referred to is a September 1932 letter from McNash to Smith, saying McNash "will continue to do all I can to cooperate with Mr. F. C. and G. A. [Ball] in helping them decide their part of the problem". The government claims that McNash helped Ball by McNash making an oral agreement to a limitation on fruit jar production. This is denied, and is discussed *infra*, p. 57.

(g) *Finding 469* (10 R. 7372) is that "Owens, Ball Brothers, Thatcher, Corning and Hazel-Atlas frequently induced Hartford to use its licensing system and the power derived by virtue of its ownership of dominating patents to assist them in artificially maintaining and stabilizing the price level at which glassware was sold". This finding is unsupported by any citation to the record, and Hazel never once so induced Hartford.

The record shows only a very few (five) isolated communications from Hazel to Hartford, which were entirely natural and proper; none after 1933; and no demand, request or suggestion by Hazel that a license should be refused or granted to anyone, although Hartford from 1933 to 1938 was very actively conducting its licensing business, there being at least ninety-seven different contracts granted or revised by Hartford during that period (H-5750, 27 R. 15436).

The record does not justify any finding that Hazel cooperated with Hartford or had anything to do with Hartford's licensing policies, which were established years before Hazel received its license. It is absurd to think even for a moment that Hartford would allow Hazel to tell it what to do. Hazel had fought Hartford patents for

many years, and when it was no longer bound by the third circuit patent, sustained against it, Hazel would be free again to attack Hartford patents. Hartford did not want Hazel to have control or even a say in what Hartford did with its patents; the cross-license agreement unmistakably did not permit Hazel any such control or voice; and the record does not show a single instance where McNash of Hazel, who was the Hazel spokesman to Hartford, ever asked Hartford to grant or refuse a license.

The plain, and really undisputed fact, is that both Hartford and Hazel had as complete control and freedom of action after the cross-license as before, with respect to their own patents. Neither had the slightest control over the other.

4. *There were no "manifestations of conscious guilt" by Hazel.*

The opinion of the trial judge has a section headed "Manifestations of Conscious Guilt" by the defendants. The Hazel Company is not said to have manifested such guilt (it never thought that what it has done was illegal).

It may be argued in this Court by the government that, because Hazel did not tell other Hartford licensees about its contract with Hartford, Hazel thought there was something wrong with it. But private contracts are not exhibited to the public, unless there is some obligation or reason for doing so. And in the present case, why should Hazel have told others about its contract with Hartford, its contract with Owens, or any other private contract it made with anyone else? The real question is whether Hazel was under any obligation to anyone to advise it of its contract relations with Hartford, because if not, there was no reason for Hazel to do something affirmative, i. e., publish the contract. And there was none. Certainly Hazel was not under any legal, or moral, obligation to tell the then existing Hartford licensees what kind of a contract it had made with Hartford, especially as those licensees had been with Hartford

and against Hazel in the six years patent suits against Hazel. Nor did Hazel have any obligation to advise prospective licensees of Hartford, who could ask Hartford what prior contracts it had made, including the Hazel contract, and refuse to deal with Hartford without seeing the Hazel or other prior licenses.

Hazel had no objection to disclosing the nature of its Hartford contract, but the other party to it, Hartford, asked that this be not done, and, as there was no reason for doing so, Hazel acquiesced (McNash, 4 R. 2392, 2408, 2410). This was entirely natural and proper.

POINT II

The trial court should not have taken Hazel's money "for the dissolution of Hartford and the establishment of competing concerns."

The final judgment (para. 46, 10 R. 7684) contains an injunction compelling the performance of a May 6, 1941 interlocutory order, and this injunction is complained of by the Hazel defendants.

The trial judge became convinced on hearing a part of the government's case that the Hartford-Hazel 1932 agreement was illegal (having so made up his mind, he did not change it after hearing the entire case), and so deciding on May 6, 1941, he ordered the parties to the alleged illegal agreement to continue performing it, by requiring Hazel to continue paying royalties to Hartford, and Hartford to continue paying Hazel for using the latter's inventions, etc., both payments being impounded and held by the clerk of the district court in Toledo, to

> "insure a sufficient fund for the dissolution of Hartford and the establishment of competing concerns if that ultimately becomes necessary" (impounding order conclusion, 1 R. 518).

The trial court declared that the defendants might dissipate the payments (1 R. 520), continuance of them would "cause irreparable injury to the competitors of Hazel-Atlas and to the public interest" (1 R. 518), and "inconvenience to Hazel-Atlas and Hartford through issuance of the Impounding Order will be inconsiderable as compared to the injury to the public if the order is not issued" (1 R. 519).

It was impossible for defendants to appeal from the interlocutory order, because only this Court has jurisdiction of appeals in such cases as the present, and then only of appeals from final judgments, Expediting Act, 15 U. S. C., Sec. 29; *U. S.* v. *California Canneries*, 279 U. S. 553, 558; *Missouri-Kansas Pipe Line* v. *U. S.*, 3 Cir., 108 F. 2d 614, 615.

Defendants Hazel and Hartford obeyed the order, and the trial court has now (September, 1943) over four million dollars, of which Hazel has paid about $1,900,000 and Hartford about $2,100,000.

The practical result of the order was to impose a heavy burden upon the Hazel Company, the only large concern other than Hartford engaged in feeder and forming machine research and development, because Hazel had to pay hundreds of thousands of dollars a year into court as royalties. At the same time, it was deprived of payment for the inventions and engineering knowledge, etc., which Hartford and its licensees have received and are now using, and Hazel was also expending hundreds of thousands of dollars a year for machine engineering and research (unlike other Hartford licensees).

The order taking the Hazel monies, and compelling Hazel to continue paying royalties because of Hartford patents, was erroneous, certainly if the cross-license agreement was lawful. Even if it were not, the trial court should not have compelled from May 6, 1941 the performance of an agreement which it considered illegal. And, in any event, Hazel was entitled to be paid by Hartford for what the latter and its licensees have received and are now receiving from Hazel. Hazel sold valuable things to Hartford and should

be paid. Not only was Hartford benefited by the Hazel licenses, engineering know-how and the release of the Lott claim, but all the numerous other licensees of Hartford, who are active competitors of Hazel. Consider, for example, the large Owens Company, which can use the Hazel inventions in competition with Hazel, why should it get the Hazel inventions, etc. for nothing?

The trial court was wrong in taking Hazel's monies, owed for valuable considerations received and still being used, to establish and finance "competing concerns". The record does not show what the trial judge has in his mind as to this, whether they are to compete in the heat-resistant, electric bulb, etc. businesses, the milk bottle business, the suction machine business, the lehr business, etc., etc., in none of which businesses Hazel and other defendants are engaged. Nor who is to run these businesses, or under whose supervision. It is difficult to decide which would be more unjust, to use Hazel's money to operate a competitor to Hazel in one or more of the lines of glassware it sells (it now has 32 competitors, 4 R. 2555), or to operate a heat-resistant concern in competition with Corning, Hazel never having been in the heat-resistant business.

But the real point here is that the Hazel money should not be taken for any purpose. If Hazel has violated the antitrust laws to the injury of anyone, remedy lies by a suit at law for treble damages, Clayton Act, Sec. 4, 15 U. S. C. A., Sec. 15 (one such suit has recently been filed against all corporate appellants), where the questions of fault and damage can be litigated.

The impounding order was wrong, and paragraph 46 of the final judgment, continuing it in effect, should be stricken.

Summary.

Hazel in 1932 lost two patent suits to Hartford, settled all existing controversies with it, obtained a *non-exclusive* license until the patents expired, and granted Hartford a *non-exclusive* license for Hazel's patent rights and engi-

neering knowledge, with right to sublicense others. Hazel reserved full ownership of its patents, sole right to sue thereon, and unqualified rights to grant licenses to others. Hazel agreed to pay Hartford for the use of licensed inventions. Hartford agreed to pay for what it got from Hazel, by dividing royalties received from Hartford's licenses.

Hazel did not violate the antitrust laws by making the 1932 cross-license agreement, and 1935 supplement, with Hartford. Whether or not it did, the order taking Hazel's money was erroneous.

POINT III

The Owens-Hazel agreement of 1932, and its 1935 supplement, did not violate the Sherman Act.

This is an alleged *suction machine* conspiracy matter, the Owens Company being said to be the monopolizer and Hazel to have conspired with it (finding 431, 10 R. 7366; conclusions of law, 60, 61, 79, 80, 10 R. 7414, et seq.).

The agreements found illegal were a July 1, 1932 agreement (Exs. 148 and 149, 12 R. 8813 and 8821), and a 1935 substitute agreement (Ex. 572, 12 R. 9128). These were patent cross-licenses between Owens and Hazel.

Owens had invented and built suction machines as long ago as 1906, and they were then exceedingly useful machines. Hazel needed them in its business, which was wide-mouth ware, and in 1909 bought several machines from Owens. By a cross-license agreement, the 1909 agreement hereinbefore referred to in connection with the Lott patents (*supra*, p. 34), Hazel received an *exclusive* license for its business and gave Owens an *exclusive* license in its business, which was narrow-neck ware. This meant that Owens could not grant licenses under its patents to other than Hazel, without its consent, in the wide-mouth field, and, in turn, that Hazel could not license others in the narrow-neck field, without Owens consent.

As a practical matter, Hazel has never designed or built a suction machine, or had any suction patents, nor is there any claim in this case to the contrary. Hazel abandoned suction machines in 1929 (McNash, 4 R. 2560).

In 1932, the settlement of the Hartford and Hazel controversies and the taking by Hazel of a license from Hartford, which license included the Owens patents, made desirable a revision of the old 1909 agreement which was done. The principal features of the 1932 agreement were:

First, all the licenses to Hazel became *non-exclusive*, i. e., all that Hazel got was an immunity from suit on Owens patents. Owens retained its exclusive license for suction inventions under the Hazel patents (there were none).

Second, both Hazel and Owens terminated their feeder and forming machine licenses to each other, because they were unnecessary so long as each was licensed by Hartford, which could grant licenses under Hazel and Owens patents, subject to revival of the licenses upon termination of licenses from Hartford.

It is difficult to see how Hazel violated the anti-trust laws by this agreement. It is true that the 1909 grant by Hazel to Owens of an exclusive license for suction inventions was continued, but Hazel has never designed or built a suction machine or had any patent on a suction machine (nor is there any finding to such effect), so this was of no practical consequence.

It seems to be the case that Owens has not licensed anyone except Hazel for suction machines, but Hazel has nothing to do with that—it is solely Owens' affair.

In the court below, the government asserted that the 1932 *non-exclusive* license by Owens to Hazel "had the result of preventing any competitor from using suction machines in competition with Hazel-Atlas" (brief, p. 207). As it may again so assert, it should be emphasized that the agreement did exactly the opposite—releasing Owens to license anyone to compete with Hazel.

The 1935 agreement between Owens and Hazel provided that if Owens should add to the patents under which Hazel

had *non-exclusive* licenses, by buying some, Hazel would pay part of the purchase price, and get *non-exclusive* licenses under the new patents. This was fair and reasonable.

In 1942, Owens waived the exclusivity of its licenses from Hazel (Ex. O-6179, 13 R. 9892).

The Hazel Company in 1932 did not receive any licenses from the Owens Company other than non-exclusive licenses. The Owens Company has been free since 1932, so far as Hazel is concerned, to sell or license its machines and patents, to any one and under any conditions it desires. Hazel itself has never invented or built any suction machines.

The trial court erred in concluding that Hazel violated the Sherman Act by entering into its 1932 and 1935 agreements with Owens.

POINT IV

There was no "oral understanding" limiting fruit jar production, on the part of Hazel.

The trial court found, *without any support in the record,* that Hazel was a party to an "oral understanding" to limit the production of fruit jars (finding 383, 10 R. 7358). If there was one, the trial court was right in deciding it was illegal (conclusion 77, 10 R. 7414).

The other parties to the "understanding" were said to be the Hartford, Owens and Ball Brothers companies. What occurred was plain, simple and undisputed.

In the fall of 1933, Ball Brothers negotiated with Hartford for a license to manufacture fruit jars and other ware, and wanted to get exclusive rights for fruit jars or as nearly exclusive as Hartford could give. At that time, Hartford had already given unlimited fruit jar licenses to Hazel and Owens.

Representatives of Hartford, Ball Brothers, Hazel and Owens discussed the possibility of the Hartford licenses

to Hazel and Owens being rewritten to incorporate in them *a patent license restriction* to 300,000 gross of fruit jars per year for Hazel and 100,000 gross per year for Owens. There is no question but that McNash of Hazel was willing, under certain conditions, that the Hazel license should be so modified. This appears from his February 9, 1933 memorandum (Ex. 191, 19 R. 12717). But that is a very different thing from saying that subsequently he made an oral agreement, irrespective of patents.

The finding of the trial court that Hazel was a party to the "oral understanding" is based on only three things, McNash's testimony, Exhibit 191 and Exhibit 947 (findings 383 and 384, 10 R. 7358).

(a) McNash testified at pages cited in the findings (4 R. 2426 and 7, 2437 and 8). Not only did he not say that there was any oral understanding, but he categorically denied that there was any "contract or understanding" to such effect (4 R. 2427 and 2441).

And the other alleged parties to the "understanding" all similarly categorically denied (Levis, 3 R. 2154; G. H. Ball, 4 R. 3045; F. C. Ball, 6 R. 4265).

(b) Exhibit 947 (21 R. 13593) shows the following:

NUMBER OF GROSS OF DOMESTIC FRUIT JARS SHIPPED IN UNITED STATES

Year	Total of Industry	Ball Bros.	Hazel-Atlas	Owens-Illinois
1928	1,252,829	753,242	241,816	61,867
1929	1,168,806	654,978	239,540	90,000
1930	884,814	453,535	187,980	81,259
1931	2,189,886	1,252,276	527,166	205,230
1932	1,419,521	792,186	289,051	123,651
1933	1,042,406	567,028	212,036	89,531
1934	900,512	504,930	152,396	78,598
1935	1,282,239	733,156	247,365	103,110
1936	817,740	434,124	159,359	66,162
1937	1,208,840	694,880	212,919	95,530
1938	857,202	489,116	138,075	44,641
1939	889,091	483,273	156,849	57,123

From this it appears that prior to 1933 Hazel was unable to sell as much as 300,000 gross a year, except for the phenomenal year of 1931, when the total sales of all concerns tremendously increased, due to abnormal conditions (McNash, 4 R. 2547). It also appears that the fruit jar business has steadily declined (housewives now buy food instead of preserving, and other jars are used for fruit jars, McNash, 4 R. 2546). The fact that since 1933 Hazel has not sold more than 300,000 gross does not prove that Hazel agreed to limit its fruit jar sales. It is perfectly apparent that Hazel's sales decreased almost exactly in proportion with the total sales of the industry. On the government's theory, Hazel could sell 300,000 gross a year, but there is no explanation by the government why it has not.

(c) Exhibit 191 (19 R. 12717) was a February 9, 1933 memorandum by McNash, discussing a proposed restriction to be placed in the Hartford patent license contract with Hazel, limiting Hazel to 300,000 gross of fruit jars a year. McNash said "I was willing to change my view to some extent with respect to Hazel's position in this matter, and *restrict our license* to 300,000 gross per year, without any mention in the contract of any conditions modifying this amount".

Nothing came of this, as the proposed revised contracts were never entered into, because of the opinion of lawyers that this would be of doubtful legality. The February 14, 1933 letter of the Hartford lawyer (Ex. 1746, 22 R. 14224) argued that it would be legal under the patent laws so to revise the Hazel and Owens licenses, but his opinion was overruled, and at a February 28, 1933 conference, it was finally decided that the patent licenses should not be so restricted (Brown, 6 R. 4078).

The theory of the government was that, after the parties decided it might be unlawful to restrict by a patent license, they did so by an oral understanding. There is not a scrap of evidence in the record to such effect, and there is the unrebutted testimony of the witnesses to the contrary. Even

if the trial judge totally ignored their positive evidence (Hazel always sold as many fruit jars as it could, McNash, 4 R. 2549), there was nothing to sustain the government's burden of establishing the illegal understanding. And, although the government claims that the companies have acted under the restrictive understanding from 1933 to date, the government failed to produce a single word to such effect.

Hazel was not a party to any understanding to restrict fruit jar sales and there is no evidence that Hazel has ever done so.

POINT V

The Glass Container Association, and Hazel as a member, did not fix quotas of production, maintain prices, keep newcomers out of the industry or organize a system of price leadership.

The complaint in its Glass Container Association section (para. 170, et seq.) charges that the Association, with its members, including defendants Owens, Hazel, Thatcher, Ball, Liberty and Anchor Hocking, have conspired to fix and maintain "arbitrary, artificial and non-competitive prices," by the Association sending production quotas and statistical data to its members, by forecasts of probable demand for articles by the public, by meetings of members of the Association, by dissuasion of new firms entering the industry by the Association at the request of Hartford and Owens, and by "a system of price leadership", which the defendants "established and agreed upon and maintained and enforced by concerted action", Corning being the price leader for heat-resistant ware, Owens for narrow-mouth glassware, Hazel for wide-mouth, Thatcher for milk bottles and Ball for fruit jars (para. 180).

The trial court made findings sustaining the charges against the Association with respect to a "quota" system

to limit production and to discourage newcomers from entering the industry. The court did not find that the Association or its members fixed or maintained prices, nor that there was "any *system* of price leadership" (findings 497-508, 10 R. 7376; conclusions of law 40, 41, 10 R. 7411). The court did find as to some defendants that each was a price leader as to certain kinds of glassware. But this was true long before the alleged conspiracy, and it was not because of any "system" or understanding, nor was it so found by the trial court.

The only finding by the trial court that the Hazel Company acted wrongfully with the Association was (10 R. 7377):

> "507. In January, 1930, Thatcher, Hartford, Owens and Hazel-Atlas, acting with the aid of the Association, engaged in a united but unsuccessful attempt to discourage Knox from increasing its capacity to produce glass containers (Exs. 630, 1841, 1842, 907, 908)".

But it was not until July, 1932 that the government even claims that Hazel joined "the said combination and conspiracy" (complaint, para. 94, 1 R. 29). It would be most surprising to find Hazel uniting with Hartford and its licensees when they were suing Hazel in patent litigation of the most serious nature. As will appear from the brief for the Association, which will discuss this and other charges involving it, this finding is unwarranted.

POINT VI

Hazel defendants McClure, Quay, Paull, Gee, Holloway and Seabright did not violate the antitrust laws.

The Hazel individual defendants before this Court are McNash, president of the Hazel Company, its vice-president and director McClure, its secretary and director Quay, and

its directors Paull, Gee, Holloway and Seabright. Findings 593 through 598 (10 R. 7394) correctly state all they had to do with the alleged violations of antitrust laws.

(a) *McNash* is not charged with any violation of the antitrust laws except in acting for the Hazel Company in its dealings with the Hartford, Owens and Ball defendants (finding 593). We agree that if the Hazel Company violated the antitrust laws in such respects, it would be proper to find also that he did.

(b) *McClure's* only relations with any of the matters complained of in the present suit are stated in the trial court's findings as follows:

> "He has been a director of Glass Container Association since 1925, and president since 1932" (finding 594, 10 R. 7394).

There is no other finding concerning him and the Association, nor, specifically, that he had anything to do with any alleged illegal act of the Association.

> "On January 4, 1933, he attended a meeting with Owens, General and Capstan, to discuss the situation with respect to the manufacture of beer bottles by Hartford licensees (R. 2362-2364; Ex. 800)" (finding 594).

Even if he had discussed this situation, in which naturally other manufacturers would be interested, there is no wrongful act charged. But it appears from the record at the places cited that McClure did not discuss it, saying only "that Hazel wants to be included in any meetings *which might be held* to discuss beer bottles, and indicated that they intended to manufacture them" (Ex. 800, 21 R. 13474; 3 R. 2041). There was nothing wrongful in this.

> "On May 15, 1933, he wrote McNash, complaining against the manufacture of fruit jars by Three Rivers in violation of their license agreement with Hartford (R. 3268, Ex. 948)" (finding 595).

McClure, as sales manager, surely did not violate the antitrust laws because he wrote to the president of his own company that another Hartford licensee was not operating within its license. This was entirely natural and proper, especially as Hazel also had limitations in its license, and naturally would want to know whether Hartford was enforcing limitations against other licensees. And it does not appear that McNash ever paid any attention to the letter.

> "On June 22, 1933, he wrote Eldred that Rieman had told him that Capstan proposed to sell fruit jars (Ex. 950). McClure described this information as 'very astonishing and, if true, very disconcerting', and requested Eldred to state whether Capstan had a feeder license from Hartford to make fruit jars" (finding 596).

Here again a sales manager would want to learn what concerns Hartford had licensed for fruit jars, so that he could know what concerns were in that field, especially as those were the depression, NRA days, when there was great overproduction.

McClure has never been an officer or director of any defendant except Hazel and the Association. He has never owned any stock or bonds in any defendant other than Hazel (10 R. 7965).

(c) *Quay* was secretary of Hazel-Atlas. He is charged with only two things (finding 597, 10 R. 7394). First, that he attested, as a witness, in his capacity of secretary of the Hazel Company, that the 1932 agreements were in fact, as they purported to be, agreements by the Hazel Company (Quay was not a director of the company at that time); and, second, that in 1935 Quay was elected as a director of Hazel to represent some Illinois Glass company holders of Hazel stock. The record does not show what if anything Quay did as such director, nor that he ever communicated with Levis or any other Illinois stockholder.

Quay has never been an officer or director of any defendant except Hazel, or owned any stock and bonds in any other

than Hazel, except 10 shares of the defendant Anchor Hocking (10 R. 7965), dismissed from the case as not violating the antitrust laws.

(d) *Paull, Gee, Holloway and Seabright* were directors of the Hazel Company, and they are not alleged or found to have done anything, except to attend the meetings of the board of directors of the Hazel Company, at which the Hazel 1932 and 1935 contracts with Hartford and with Owens were approved, these directors also voting in approval (finding 598, 10 R. 7395). It should be observed that they approved the 1932 agreements, which are the main ones with respect to the issues here, "subject to a favorable opinion by John W. Davis, special counsel, as to their legality" (Ex. 1655, 22 R. 14079).

None has been an officer or director of any defendant except Hazel, or owned any stocks or bonds in any defendant except Hazel (10 R. 7965).

The case against the Hazel Company was built up by the government from a multitude of acts, letters, memoranda, agreements, etc., over a long period of years and involving many concerns and persons, engaged, so the government says, in creating monopolies and restraining trade in patents, machines and glassware. But if there were any such conspiracies (which is denied), there is no evidence that McClure, Quay, Paull, Gee, Holloway or Seabright had anything to do in either creating them or carrying them out. There was no basis for the findings that these men violated the antitrust laws, and for the extraordinarily punitive and confiscatory injunctions (judgment, paras. 33, 34, 35 and 36) issued against them personally (*infra*, p. 68).

Strongly as we believe that error was committed as to the above individuals, this Court should not be burdened by fruitless duplication of argument. So, as there are individual Owens defendants in the same situation, whose case will be fully presented with applicable authorities in the Owens brief, we respectfully refer the Court to that brief.

POINT VII

The injunctions are unreasonable and confiscatory.

If this Court should agree with the trial court that the Hazel Company violated the antitrust laws in the matters charged, namely, with respect to its 1932 cross-license agreement with Hartford, its 1932 cross-license agreement with Owens, the alleged 1933 oral fruit jar understanding, and Glass Container Association activities, nevertheless many of the injunctions issued were unreasonable, punitive and confiscatory.

These injunctions against the Hazel defendants are contained in paragraphs 21 through 40 except 22, 27, 28 and 32; and in paragraphs 46, 51 and 52. Of these, paragraphs 37, 38, 39 and 40 contain injunctions against the Association and others, to be dealt with in the Association brief, and paragraph 46 is the order taking Hazel's money to finance "competing concerns", which has been discussed supra.

The remaining complained of injunctions will be fully dealt with in the briefs of other defendants, including discussion of the principles of law and the pertinent decisions, so to avoid unnecessary repetition, we shall here simply state the nature of these injunctions and how they affect the Hazel defendants.

(a) Paragraphs 21, 23 and 25 relate to the business of supplying glassware machines. Paragraph 21 prohibits any lease or disposition of such a machine except an outright sale. Paragraph 23 requires each sale of a model of a machine to be at the same price (although the costs may have greatly increased or decreased, either of which would prevent the later sale). Paragraph 25 forbids "wholly exclusive or partially exclusive requirement contracts".

None of the foregoing injunctions is qualified—they are absolute. All the things outlawed are ordinary business

matters, now forbidden to defendants even when they do not violate the antitrust laws.

As for Hazel, there is not even an accusation that it did anything wrong in supplying machines or with respect to "requirement contracts".

(b) Paragraph 24(a) cancels, in effect, all patents in existence at the time of the alleged conspiracy and used in it, by requiring the issue of royalty free licenses for the terms of the patents. This is plainly confiscatory.

(c) Paragraph 24(b) compels Hazel to go into the patent licensing business, and to make patent license contracts, with all the legal responsibilities inherent in such matters. The licenses are to be "at a reasonable royalty", which will lead to Hazel being involved in expensive and troublesome litigations to decide what is "reasonable". Paragraph (c) is equally objectionable, because Hazel must supply to licensees drawings and patterns "at a reasonable profit".

(d) Paragraph 26 enjoins the exercise of ordinary and normal patent and contract rights, not only with respect to present patents and contracts, but also as to the future, until "the consequences of the conduct of such defendants in violation of the Sherman Antitrust Act and the Clayton Act have been fully dissipated". Undoubtedly the district judge obtained this phrase from the opinion of this Court in the *Morton Salt* case, 314 U. S. 488, where a plaintiff patentee misused his patent and this Court refused relief to the plaintiff until "the consequences of the misuse of the patent have been fully dissipated" (p. 493). But that was a simple situation, involving only one offending concern, the plaintiff. That is not this case.

Here the defendants whose various acts are in question are Hartford, Corning, Owens, Hazel, Thatcher, Lynch, Ball and individuals. The trial court found that the heat-resistant ware business of Corning, the milk bottle business of Thatcher, the forming machine business of Lynch and many another thing in which Hazel has no interest or knowledge have been aided by the alleged conspiracy. Why should

Hazel be enjoined until something happens in businesses where Hazel has no control or even knowledge, such as the heat-resistant business? And what is that something, what are the "consequences", and what will "dissipate" them? These are not idle questions, because they affect substantial interests, nor are they susceptible, it seems to us, of any final answer short of a trial on the merits in some court, presumably the Toledo court, and an appeal to the appropriate tribunal.

(e) Paragraphs 29 and 30 prohibit the defendants from hereafter ever granting a limited patent license, whether or not doing so might violate the patent laws, and whether the patent is now in existence.

The difference between paragraphs 29 and 30 is that the former includes dealings by defendants with anyone, and paragraph 30 is limited to dealings between Hartford and the defendants. We think that either the trial court did not understand that paragraph 29 included paragraph 30, or thought they meant the same thing. In either case, they are too broad, as they forbid lawful transactions which do not violate the antitrust laws.

(f) Paragraph 31 requires "the approval" by the trial court of "The form of any agreement between any of the defendants and of any license agreement made pursuant to this judgment and to which any of the defendants is a party". First, note that it is "any agreement", including matters wholly unrelated to patents, machines, glassware or anything involved in the present suit. Second, appreciate what this means as a practical matter. Every corporate defendant, and also all the individual defendants, will have to commence a proceeding in the Toledo court for approval of any new agreement (even a personal contract between a corporate defendant and its employee defendant). Such agreements may, and undoubtedly often will, involve very large amounts, so that full trials in Toledo will be necessary, with all the attendant expense and inconvenience for non-resident defendants. Suppose the trial judge ap-

proves the proposed agreements, can the Attorney General, who must be notified, appeal to this Court, and if he can not, is the trial court's decision as to legality of the agreement res judicata against the government? And if the trial judge decides against defendants, is there any review of his decision, or must the defendants accept it without recourse? Only this Court has appellate jurisdiction in such cases as the present one, and only as to final judgments, Expediting Act, 15 U. S. C., Sec. 29; *U. S.* v. *California Canneries*, 279 U. S. 553, 558; *Missouri-Kansas Pipe Line* v. *U. S.*, 3 Cir., 108 F. 2d 614, 615.

(g) Paragraphs 33, 34, 35 and 36 enjoin the Hazel Company and the individual defendants connected with it from owning securities, etc. in any other concern manufacturing either glassware or glassware machinery, and the individuals are also enjoined from being an officer or director in more than one concern which makes and sells either glassware or glassware machinery. These injunctions are unqualified and not limited to even a substantial ownership of stock or to such acts "in violation of the antitrust laws."

There was not the slightest basis for such an injunction against the Hazel defendants.

(1) The Hazel Company never owned any stock, bonds, etc., of any other defendant.

Only two of the Hazel individual defendants owned any stock or bonds in any other defendant (10 R. 7965). Approximately, in the Owens Company (11 R. 8197) McNash owned .0005% (1,377 shares); in the Anchor Hocking Company (11 R. 8193) McNash owned .0002% (148 shares) and Quay owned .00001% (10 shares); in the Thatcher Company (11 R. 8193) McNash owned .008% (1,280 shares); and in the Lynch Company McNash owned .00009% (13 shares). The ownerships of these insignificant amounts of stock, without the slightest evidence of any attempted control by means of them, did not warrant the far sweeping and punitive injunctions against not only these two defendants, but also against all the other Hazel defendants.

(2) No Hazel defendant was an officer or director of any other defendant.

There is absolutely no evidence in the record (and not even a so-called "finding of fact") to support the injunctions against each of the Hazel defendants with respect to owning stocks or bonds, and holding offices or directorship in other companies.

(h) Paragraphs 51 and 52 are similar to paragraphs 29 and 30, forbidding defendants from purchasing patents or exclusive patent licenses, or endeavoring to patent new inventions, whether or not doing these normal and proper things should violate the antitrust laws.

The foregoing makes plain the extraordinary, unprecedented and confiscatory nature of many of the orders issued by the trial court, which appears to have overlooked the simple fact that any violation of the antitrust laws is a misuse of things otherwise lawful to do, and which is punishing defendants by depriving them of the right to do these things in a lawful and proper manner. Injunctions should be preventive—not punishments for the past.

Conclusion

1. The Hazel-Atlas Company and McNash did not violate the antitrust laws, by the Hazel Company:

(a) Entering into its 1932 cross-license agreements and supplements with the Hartford Company, and with the Owens Company;

(b) Making an oral or other agreement, limiting the production of fruit jars; or

(c) Acting with the Glass Container Association.

2. The order impounding Hazel's monies "for the dissolution of Hartford and the establishment of competing concerns" should be vacated.

3. The Hazel individual defendants McClure, Quay, Paull, Gee, Holloway and Seabright did not violate the antitrust laws.

4. Many injunctions were erroneous, even if the anti-trust laws had been violated.

Respectfully submitted,

STEPHEN H. PHILBIN,
JOSEPH D. STECHER,
Counsel for HAZEL-ATLAS *Defendants.*

October, 1943.